(37,570)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 27

STATE OF MISSOURI AND FRANKLIN MILLER, ETC., PETITIONERS,

vs.

JOHANNA F. FISKE, AMANDA F. WHEELER, HENRIETTA A. HOLDOWAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] [Caption omitted]

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[fol. 2]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI

ORDER GRANTING STATE OF MISSOURI LEAVE TO INTERVENE AS A DEFENDANT—June 1, 1931

Now come the parties by their respective solicitors; whereupon the petitions of Johanna F. Fisk, et al., Sherman H. Kleinschmidt, et al., Clare E. Franz, et al., and Gustave A. Franz, Jr., et al., for distribution of remainder interest, as well as petition of trustees for directions in regard to distribution of trust estate are argued and submitted to the Court; thereupon the petition of Earl F. Nelson, Guardian ad litem, for allowance of compensation and expenses is heard and submitted to the Court.

And now it is Ordered that the separate motions of plaintiff (1) for modification of distribution and allowance of attorney's fees and expenses (2) for partial distribution of remaindermen, as well as (3) exceptions of plaintiff to certain reports of Trustees, and (4) motion of S. Mayner Wallace, original solicitor for plaintiff, praying that the estate of plaintiff be paid into the Registry of this Court, be, and the same are hereby, continued to the next motion day.

And now, by leave of Court, Mississippi Valley Trust Company, Administrator, c. t. a. of the estate of Ernst H. Franz, deceased, files herein its petition for distribution of remainder interests, which said petition is submitted to the Court. And now, by leave of Court, said Mississippi Valley Trust Company, as Administrator, c. t. a. of the estate of Walter G. Franz, deceased, also files herein its petition for distribution of remainder interests.

And now, by leave of Court, the application of the State of Missouri for leave to intervene herein, together with

separate notices to docket said application for hearing on this day, acknowledged by counsel for plaintiff and defendants, is filed; Whereupon, by agreement of parties, it is Ordered that said application be, and the same is hereby, granted, and that said petitioner is allowed five days from this date within which to file its formal intervening petition.

And now, by leave of Court, S. Mayner Wallace files herein his ancillary and supplemental bill for enforcement of solicitor's lien.

[fol. 3] IN UNITED STATES DISTRICT COURT

MOTION OF STATE OF MISSOURI FOR LEAVE TO INTERVENE—Filed June 1, 1931

Comes now Stratton Shartel, Attorney General of the State of Missouri, and for and in behalf of the State of Missouri, moves the Court to permit said State of Missouri to intervene as a party defendant in this cause, and for his reason states that a citation has been issued upon the application of the Circuit Attorney of the City of St. Louis, Missouri, in the Estate of Sophie Franz, No. 71459 in the Probate Court of the City of St. Louis, Missouri, to require Gustavus A. Buder, executor of said estate, to inventory certain assets alleged to have been owned by said Sophie Franz at her death, to-wit: 188,333⅓ shares of no par value common stock of the Burroughs Adding Machine Company, and that said citation is returnable in said court on the 12th day of June, 1931. That on the 5th day of May, 1927, this Court entered in this cause a decree to the effect that the plaintiff herein, Ehrhardt W. Franz, the Estate of Walter G. Franz, and the Estate of Ernest H. Franz, were then the owners each of an undivided 1/10 interest in remainder under the last will of Ehrhardt D. Franz, deceased, and that plaintiff and said estates would be entitled to the possession of said remainders upon the death of Sophie Franz as life tenant of said property, and that the defendant, Eleanor Kleinschmidt, as one of the heirs of Minna F. Kleinschmidt, deceased, was also the owner, jointly with other heirs, of an undivided 1/10 interest in remainder. That on or about the 13th day of May, 1930, the life tenant, Sophie Franz, departed this life and admin-

istration was begun upon her estate under the terms of her will, in Estate No. 71459 as heretofore mentioned, on the 13th day of May, 1930, and letters testamentary were issued to Gustavus A. Buder on the 14th day of May, 1930. That thereafter, to-wit, on the 17th day of May, 1930, Gustavus A. Buder and Gustav A. Franz, as trustees under the trust agreement of January 30, 1909, which trust agreement included all the properties in the estate of said Ehrhardt D. Franz, made application for instructions in the distribution of said properties in trust, and that the defendants Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmerman, Sherman H. Kleinschmidt and Helen Kleinschmidt each made application for distribution of a share of the properties in said trust to them as remaindermen of Ehrhardt D. Franz, though this Court has never decreed that they had a vested remainder in the estate of Ehrhardt D. Franz. That the 188,333⅓ shares of no par value common stock of the Burroughs Adding Machine Company which Gustavus A. [fol. 4] Buder, as executor of the estate of Sophie Franz, deceased, failed to inventory in said estate, properly belonged to Sophie Franz in her own right at her death, subject only to the remainders heretofore adjudicated in this cause to be vested remainders, to-wit: those of Ehrhardt W. Franz, the Estate of Walter G. Franz, the Estate of Ernest H. Franz, and the interest of Eleanor Kleinschmidt as one of the heirs of Minna F. Kleinschmidt. That said Stock is now being held by Gustavus A. Buder and Gustav A. Franz as trustees under the trust of January 30, 1909 and should be turned over to Gustavus A. Buder as executor of the estate of Sophie Franz and inventoried by him as such. That Gustavus A. Buder and Gustav A. Franz as trustees and Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmerman, Sherman H. Kleinschmidt and Helen Kleinschmidt have all served notice on counsel for various parties herein that they intend on the 1st day of June, 1931, to take up their respective motions to distribute and should this Court act upon said motions and distribute to any parties other than Ehrhardt W. Franz, the Estate of Walter G. Franz, and the Estate of Ernest H. Franz and Eleanor Kleinschmidt, that said 188,333⅓ shares of stock will be distributed to parties who have no interest therein and will not be inventoried as

a part of the Estate of Sophie Franz, deceased. That the estate of Sophie Franz, deceased, is subject to the Inheritance Tax Laws of the State of Missouri, and the State of Missouri upon the death of Sophie Franz acquired a lien upon all property belonging to said Sophie Franz at her death. That it is necessary to protect the interests of the State of Missouri in the assessment and collection of inheritance taxes upon all properties belonging to said Sophie Franz at her death, that said State of Missouri be permitted to intervene as a party defendant herein so that it may file proper pleading in opposition to the motions of Gustavus A. Buder and Gustav A. Franz, trustees and Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmerman, Sherman H. Kleinschmidt and Helen Kleinschmidt, pending the termination of the issues involved in the Estate of Sophie Franz in the Probate Court of the City of St. Louis, Missouri.

Wherefore this applicant prays that he be permitted to intervene as a party defendant in this cause and to file such pleadings and offer such proof as is necessary to protect its rights, and that an order be entered making the State of Missouri a party defendant herein.

Stratton Shartel, Henry Stern, and Richmond C. Coburn.

[fol. 5] *Duly sworn to by Richmond C. Coburn. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

INTERVENING PETITION OF THE STATE OF MISSOURI—Filed June 6, 1931

Comes now Stratton Shartel, Attorney General of the State of Missouri, and for and in behalf of the State of Missouri, for its intervening petition states that on the 5th day of May, 1927, this Court entered in this cause a decree finding that Ehrhardt W. Franz, the estate of Walter G. Franz, and the estate of Ernest H. Franz, were the owners, each, of an undivided one-tenth (1/10) interest in remainder under the last will of Ehrhardt D. Franz, deceased, and that plaintiff and said estates would be entitled to the possession

of said remainders upon the death of Sophie Franz as life tenant of said property, and that the defendant, Eleanor Kleinschmidt, as one of the heirs of Minna F. Kleinschmidt, deceased, was also the owner, jointly with other heirs, of an undivided one-tenth (1/10) interest in the remainder. That said decree made no finding as to the other children of Ehrhardt D. Franz, deceased, and their descendants. The intervener states that, although the remaining children of Ehrhardt D. Franz, deceased, were by said deceased's will given remainders of an undivided one-tenth (1/10) interest each in his estate, all of said children and their descendants, other than those found to have a vested remainder in the decree aforesaid, prior to the entry of said decree, by diverse acts and by pleadings filed in this cause extinguished, transferred and assigned their remainder interest to the life tenant, Sophie Franz. That on or about the 13th day of May, 1930, the life tenant, Sophie Franz, departed this life, and administration was begun upon her estate under the terms of her will, in the Probate Court of [fol. 6] the City of Saint Louis, Missouri, Estate No. 71459, as heretofore mentioned, and letters testamentary were issued to Gustavus A. Buder on the 14th day of May, 1930. That said Buder filed his inventory in said estate, but failed to inventory therein 188,333⅓ shares of no par value common stock of the Burroughs Adding Machine Company, which stock at the date of the death of Sophie Franz had a market value of Forty-eight ($48.00) Dollars per share. That said stock is now in the custody of Gustavus A. Buder and Gustav A. Franz, as trustees, under a certain trust created by Sophie Franz during her life time, and are now preparing to divide said stock equally among the children of Ehrhardt D. Franz, deceased, and their descendants. Although this Court has only determined that plaintiff herein, the estate of Walter G. Franz, the estate of Ernest H. Franz and Eleanor Kleinschmidt have remainder interests, and are entitled to any portion thereof, the children and their descendants, other than those whose rights were adjudicated in the decree of May 5, 1927, have moved this Court for distribution to them. That said stock, except that portion thereof which belongs to plaintiff, the estate of Walter G. Franz, the estate of Ernest H. Franz and Eleanor Kleinschmidt, was owned by Sophie Franz at her death, should have been inventoried, and is sub-

ject to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of Sophie Franz, deceased, and the State of Missouri since the date of the death of said Sophie Franz, to-wit: May 13, 1930, has had and now has a lien upon said stock for said taxes. That the Circuit Attorney of the City of Saint Louis, Missouri, pursuant to the Inheritance Tax Laws of said state, has made application for the issuance of a citation in the estate of Sophie Franz, deceased, against the executor, thereof, to require him to inventory said stock. That said citation has been served and is returnable on June 12, 1931. That the Attorney General, pursuant to request from the Treasurer of the State of Missouri, has entered his appearance in said proceedings to assist the Circuit Attorney therein.

Wherefore this intervener prays that a portion of said stock to secure the assessment and collection of Inheritance Taxes of the State of Missouri on said stock under the terms of the will of Sophie Franz, deceased, be transferred by said Gustavus A. Buder and Gustav A. Franz, trustees, to the registry of this Court to be there held until it may be determined in the Probate Court of the City of Saint Louis whether said stock should have been inventoried therein by [fol. 7] Gustavus A. Buder, as executor of the estate of Sophie Franz.

Stratton Shartel, Henry Stern, Richmond C. Coburn.

Duly sworn to by Richmond C. Coburn. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ANCILLARY AND SUPPLEMENTARY BILL OF COMPLAINT FOR AN INJUNCTION—Filed June 10, 1931

Come now Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz, defendants in the above entitled cause, and for their ancillary bill for an injunction against the State of Missouri, intervener herein, and its attorneys of record, state that, at the time of the filing of the original bill and at the time of the filing of the amended bill herein, and at present, Jo-

hanna F. Fiske was, and is, a citizen of the State of New Mexico, at all times a resident thereof, residing therein; that Amanda F. Wheeler and Otto B. Franz were, and are, citizens of the State of California, at all times residents thereof, residing therein, and that Henrietta A. Holdoway and Adelaide Zimmerman were, and are, citizens of the State of Illinois and at all times residents thereof, residing therein; and that the State of Missouri is, and has been, a party in this cause since its intervention herein on the 1st day of June, 1931; that Stratton Shartel at all times herein mentioned was, and is, the Attorney General of the State of Missouri; that Franklin Miller at all times herein mentioned was, and is, the Circuit Attorney of the City of St. Louis, State of Missouri; and that Stratton Shartel, [fol. 8] Franklin Miller, Richmond C. Coburn and Henry H. Stern, and each of them, are attorneys, counselors and solicitors for, and in behalf of, the State of Missouri in the matters, things and proceedings herein mentioned; and that said Stratton Shartel, Franklin Miller, Richmond C. Coburn and Henry H. Stern were, at the time of the filing of the intervening petition of the State of Missouri on June 6, 1931, and still are, citizens of, and at all times residents of and residing in the State of Missouri; that this is a suit of a civil nature in equity where the matter in controversy exceeds, exclusive of interest and costs, the value of Three Thousand ($3,000.00) Dollars and is between a state and citizens of different states and between citizens of different states.

Complainants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide M. Zimmerman, and Otto B. Franz state that each of them is the owner of a one-tenth vested remainder interest in the Estate of Ehrhardt D. Franz, deceased, as ascertained and decreed by this Court, and that each of them is entitled to receive from G. A. Franz and G. A. Buder, Trustees, subject to various fees, commissions, expenses, deductions and a claim for Federal income taxes, 28,250 shares of stock of the Burroughs Adding Machine Company, a Michigan corporation, in satisfaction and discharge of said remainder interest; and said complainants further state that they and each of them have petitioned this Court, and this Court now has under submission their various petitions, for the distribution of said remainder interests.

Complainants further state that the above named interveners, the State of Missouri, and its attorneys aforesaid, did, on the 19th day of March, 1931, file in the Probate Court of the City of St. Louis, State of Missouri, in the matter of the Estate of Sophie Franz, deceased, No. 71,459, an affidavit for citation to require G. A. Buder, Executor of the Estate of Sophie Franz, deceased, to inventory certain assets, by which they seek to force and compel Gustavus A. Buder, the Executor of the said Estate of Sophie Franz, deceased, to inventory as an asset of said Estate 188,333-⅓ shares of stock of the Burroughs Adding Machine Company, a Michigan corporation, the said stock being the same shares owned by the above named complainants and G. A. Franz, Sherman Kleinschmidt and Helen Kleinschmidt, and to which they are now entitled as aforesaid; that pursuant to said affidavit there has issued and has been served upon Gustavus A. Buder a citation for concealment of property alleged to belong to the Estate of Sophie Franz, deceased, contrary to the decree of this Court as aforesaid, and com-
[fol. 9] manding said Gustavus A. Buder to be and appear in the Probate Court of the City of St. Louis on the 12th day of June, 1931, at 10:00 o'clock A. M. of that day in order to submit to an examination for the discovery of said personal property; that at said time, unless enjoined, the defendants herein, and each of them, will attempt and endeavor to obtain orders, decrees and judgments adverse and prejudicial to the rights and interests of the above named plaintiffs in this cause in this Court and orders, decrees and judgments which will prejudicially affect, impair and defeat the jurisdiction of this Honorable Court and the decree rendered by it in the premises.

Complainants further state that unless the attempts, endeavors and actions contemplated by the above named defendants, as aforementioned, are prevented by this Court, plaintiffs will suffer immediate and irreparable injury, loss and damage.

Wherefore, the premises considered, complainants pray for a writ of injunction enjoining the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern, and each of them, from directly or indirectly

prosecuting further the said citation in the Probate Court of the City of St. Louis, State of Missouri, in the matter of the Estate of Sophie Franz, deceased, No. 71459, and particularly from seeking or obtaining any order, decree or judgment therein until the further direction of this Honorable Court; and, to the end that the said injury may be prevented and the jurisdiction of this Honorable Court, and its orders and decrees herein, may be upheld, maintained, sustained and preserved, the above complainants also pray the issuance of a preliminary injunction to the effect above set forth until the hearing of this ancillary and supplemental bill of complaint. Plaintiffs further pray for any and all other and further relief in the premises, including costs, which to this Honorable Court shall seem meet and proper.

G. A. Buder, Jr., and Oscar E. Buder, Their Solicitors and Attorneys.

Duly sworn to by Oscar E. Buder. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

ANSWER OF JOHANNA F. FISKE ET AL. TO INTERVENING PETITION OF THE STATE OF MISSOURI—Filed June 15, 1931

Come now Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, Otto B. Franz, Gustav A. Franz, Sherman H. Kleinschmidt and Helen Kleinschmidt, defendants in the above entitled cause, and, leave of Court having been first had and obtained, file this their answer to the intervening petition of the State of Missouri heretofore filed herein on the 6th day of June, 1931.

Said defendants admit that on the 5th day of May, 1927, this Court entered in this cause a decree finding that Ehrhardt W. Franz, the Estate of Walter G. Franz and the Estate of Ernest H. Franz, were the owners each of an undivided one-tenth interest in remainder under the last will of Ehrhardt D. Franz, deceased, and that said plaintiff and said Estates would be entitled to the possession of said re-

mainders upon the death of Sophie Franz, as life tenant of said property, and that defendant Eleanor Kleinschmidt, as one of the heirs of Minna F. Kleinschmidt, deceased, was also the owner, jointly with other heirs, of an undivided one-tenth interest in said remainder.

Said defendants admit that Sophie Franz, the life tenant, departed this life on or about the 14th day of April, 1930, and that administration was begun upon her Estate under the terms of her will, in the Probate Court of the City of St. Louis, Missouri, Estate No. 71459, and that letters testamentary were issued to Gustavus A. Buder on the 14th day of May, 1930; and further admit that the no par value common stock of the Burroughs Adding Machine Company [fol. 11] had a market value of Forty-eight ($48.00) Dollars per share at the date of the death of said Sophie Franz; and further admit that these defendants have petitioned this Honorable Court, and that this Honorable Court has under submission their several petitions, for distribution of their respective remainder interests in and to the Estate of Ehrhardt D. Franz, deceased, hereinafter mentioned and referred to.

Said defendants further admit that the Circuit Attorney of the City of St. Louis, Missouri, has made application for the issuance of a citation in the Estate of Sophie Franz, deceased, against the Executor thereof, to require him to inventory 188,333-1/3 shares of the no par value common stock of the Burroughs Adding Machine Company; that said citation has been served and was returnable on June 12, 1931; and further admit that the Attorney General has entered his appearance in said proceedings.

For answer and defense to said intervening petition of the State of Missouri said defendants expressly deny that the decree of this Court entered in this cause on the 5th day of May, 1927, as aforesaid, confined its finding of the existence and ownership of interests in remainder under the last will of Ehrhardt D. Franz, deceased, to Ehrhardt W. Franz, the Estate of Walter G. Franz, the Estate of Ernest H. Franz, and Eleanor Kleinschmidt; and further deny that said decree made no finding as to these defendants and the existence of their respective remainder interests; and further deny that these defendants, or any of them, at any time extinguished, transferred or assigned their respective remainder interests to the life tenant, Sophie Franz.

Said defendants further deny that Gustavus A. Buder, the Executor of the Estate of said Sophie Franz, deceased, has failed to inventory therein any stock of the Burroughs Adding Machine Company owned by said Sophie Franz at the time of her death; and further deny that any of the stock mentioned and referred to in the intervening petition was owned by Sophie Franz at her death, deny that it should have been inventoried, deny that it is subject to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of Sophie Franz, deceased, and deny that the State of Missouri has now, or has at any time had, a lien thereon for inheritance taxes.

Said defendants further state that the last will and testament of Ehrhardt D. Franz, deceased, contained, among others, the following provision, to-wit:

[fol. 12] "The rest, residue and remainder of my estate, whether real, personal or mixed property, I give, bequeath and devise unto my beloved wife Sophie Franz, for and during the period of her natural life. After the termination of the life estate of my wife, I give, bequeath and devise the remainder in equal shares, share and share alike, unto my children, Minna, Johanna, Ehrhardt, Ernest, Amanda, Gustav, Walter, Otto, Henrietta and Adelaide, and unto their respective heirs and assigns forever";

that defendants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, Otto B. Franz and Gustav A. Franz are the children and parties referred to in said provision of the last will and testament of Ehrhardt D. Franz, deceased, as Johanna, Amanda, Henrietta, Adelaide, Otto, and Gustav, respectively; that Sherman H. Kleinschmidt is the widower of Minna Kleinschmidt, deceased, she being the child and party referred to in said provision of the last will and testament of Ehrhardt D. Franz, deceased, as Minna, and that Helen Kleinschmidt is one of the two children of said Minna Kleinschmidt, deceased, and that each of them is the owner of an undivided one-third of the said remainder interest of said Minna Kleinschmidt in the Estate of Ehrhardt D. Franz, deceased. Said defendants further state that this Court has decreed in this cause, and that the United States Circuit Court of Appeals for the Eighth Circuit, has held in and upon various appeals from the orders and decrees of this Court in this

cause that each of the children and parties mentioned in said provision of the last will and testament of Ehrhardt D. Franz, deceased, was, and is, the owner of an undivided one-tenth interest in remainder under the last will of Ehrhardt D. Franz, deceased; and further found and decreed that the stock dividends declared and issued by the Burroughs Adding Machine Company during the existence of the life Estate were not income belonging to Sophie Franz, the life tenant, but were, and are, accretions to the corpus of the Estate of Ehrhardt D. Franz, deceased, belonging to the remaindermen specified in the will of Ehrhardt D. Franz, deceased; that these defendants have not undertaken, done or caused to be done any acts or deeds which have or would have extinguished, transferred or assigned their respective remainder interests to the life tenant, Sophie Franz; and that the existence of the remainder interests of these defendants is res adjudicata.

[fol. 13] Wherefore said Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, Otto B. Franz, Gustav A. Franz, Sherman H. Kleinschmidt and Helen Kleinschmidt, prays that their respective remainder interests in and to the Estate of Ehrhardt D. Franz, deceased, be reaffirmed and further adjudicated, declared and determined and that their said respective remainder interests be recognized, guarded and protected against the alleged claims and demands of the State of Missouri; that the intervening petition of the State of Missouri herein, and the prayer thereof, be dismissed, overruled and denied, and that the Court sustain the respective motions of these defendants for distribution of their respective remainder interests in and to the Estate of Ehrhardt D. Franz, deceased, which said motions are now under submission in and before this Honorable Court.

Buder & Buder, Attorneys for Answering Defendants.

In United States District Court

Motion to Dismiss Ancillary and Supplemental Bill of Complaint for an Injunction—Filed June 29, 1931

Comes Now the State of Missouri and appearing for the purpose of this motion only and as an intervener moves this

Court to dismiss the ancillary and supplemental bill of complaint for an injunction of Johanna F. Fiske, et al., in this cause for the following reasons, to-wit:

1. Said ancillary and supplemental bill of complaint does not state facts sufficient to warrant the intervention of equity.

2. That it appears upon the face of the ancillary and supplemental bill of complaint that the Court does not have jurisdiction thereof and to grant the relief prayed for herein, in that;

(a) That on the first day of June, 1931, by an order of this Court the State of Missouri was admitted to this cause as an intervener only and not as a party plaintiff or defendant; that Stratton Shartel on said date was and now is the duly elected, qualified and acting Attorney General of the State of Missouri and appears as counsel on behalf of the State of Missouri in this cause and in the proceedings in the Probate Court in said capacity; that Franklin Miller on said date was and now is the duly elected, qualified and acting Circuit Attorney of the City of St. Louis, Missouri, a public [fol. 14] officer of the State of Missouri, and appears as counsel in the proceedings in the Probate Court in that capacity and that Henry H. Stern on said date was and now is a duly appointed Assistant Attorney General of the State of Missouri and Richmond C. Coburn was on said date and now is a duly appointed Special Assistant Attorney General of the State of Missouri and both appear in the proceedings in the Probate Court and in this cause as counsel for the State of Missouri in said capacities.

That this Court is without jurisdiction to entertain the ancillary and supplemental bill of complaint for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, Missouri, Henry H. Stern, Assistant Attorney General of the State of Missouri, and Richmond C. Coburn, Special Assistant Attorney General of the State of Missouri, for the reason that it appears upon the face of the bill of complaint that the complainants in said ancillary and supplemental bill in substance seek to enjoin the State of Missouri from a proceeding in the Probate Court of the City of St. Louis, State of Missouri (which proceeding is an action to compel Gustavus A. Buder, as

executor of the estate of Sophie Franz, deceased, to inventory certain property belonging to said Sophie Franz at her death). That the State of Missouri under the 11th Amendment to the Constitution of the United States is immune from suit and said State of Missouri has not consented that it be sued in this cause or any proceeding seeking the restraint of proceedings in the Probate Court.

(b) It appears from the face of the defendants' ancillary and supplemental bill of complaint that said defendants seek an injunction to stay proceedings in a court of the State of Missouri, to-wit, the Probate Court of the City of St. Louis, State of Missouri, in violation of Section 265 of the Judicial Code of the United States.

(c) The relief prayed for in the ancillary and supplemental bill of complaint prays this Court to enter a decree which would interfere with the proper administration of an estate in the Probate Court of the City of St. Louis, Missouri, to-wit, that of Sophie Franz, deceased, No. 71459.

Stratton Shartel, Henry Stern, Richmond C. Coburn,
Attorneys for Intervener, State of Missouri.

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION OF STATE OF MISSOURI TO DISMISS ANCILLARY AND SUPPLEMENTAL BILL OF COMPLAINT OF JOHANNA F. FISKE ET AL.—NOV. 2, 1931

Now, the Court having considered the motion of the State of Missouri, intervener herein, to dismiss the verified application of defendants, Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz, for an injunction,

It is Ordered that said motion of Intervener be, and the same is hereby, sustained in oral opinion this day announced.

(Signed) C. B. Faris, Judge.

Dated November 2, 1931.

IN UNITED STATES DISTRICT COURT

OPINION OF COURT—Filed Nov. 19, 1931

There was submitted some time ago, in this case, a motion to dismiss an ancillary bill for injunction, which ancillary bill was brought by the Trustees Franz and Buder against the State of Missouri to enjoin it from prosecuting further its intervening petition in this cause. This motion to dismiss was bottomed upon two propositions, or, rather, upon one proposition to which a secondary one was incidental.

The State of Missouri had come in here alleging that it had a lien on the fund, or a part of it, in the custody of this Court, for certain inheritance taxes. It proposed by its intervention to set up that lien. Thereupon, the plaintiff in the ancillary proceeding for an injunction brought an action against the State of Missouri, in effect, as forecast, to halt the State of Missouri's action in the behalf mentioned.

It is urged here in the motion to dismiss the ancillary bill for an injunction, that the State of Missouri being a sovereign cannot be sued in this situation, and that the mere fact that it intervened in order to obtain its part of an alleged lien for inheritance taxes does not warrant a suit against it, absent a plenary statute so providing.

To my mind it is very clear that that defense on the part of the State of Missouri ought to be sustained. The State of Missouri came in not as a regular defendant in the case, [fol. 16] because the case had years ago gone to a final decree; therefore it could not become, strictly speaking, a defendant. It did not, in other words, inject itself into the case as a regular defendant, if I may so express it, but it came in, in order to protect its own interest. I think it had a right to do that, other things being equal. I am not passing now, mark you, upon the merits of the case.

The situation arose very recently in numerous cases in the Southeastern Division, where a county collector and certain levee and drainage districts came forward, after judgment, and urged a lien upon the proceeds of the main proceeding then in the registry of the Court. It seemed to me, in those cases, to be perfectly clear that the district and the county collector had the right, if they had a lien upon the fund in the hands of the Court, to assert that lien

and it did not make them parties, that is to say, the assertion of a lien did not make them ordinary parties.

I think the State of Missouri here is not an ordinary party. It is a proceeding in the nature of that situation expressed by the three Latin words pro interesse suo. It came in, I repeat, in order to protect its own interest, without regard to any interest in the main proceeding of either the plaintiff or the defendant. I think it had a right to do that, and I do not think, having done so, that it is liable to be sued (absent its consent and absent a general statute giving consent) unless it is willing to be sued, and the fact that it has filed a motion to dismiss indicates very clearly its unwillingness to be sued.

A number of years ago I had the same situation up, perhaps in a closer case than this, wherein the Republic of France had sued, in this Court, the Inland Navigation Company, a boat-building concern (La Republique Francaise vs. Inland Navigation Co., 263 Fed., 410). The boat-building concern put forward a counterclaim. After a very careful investigation of the authorities I took the view that it was not suable, absent its consent. There is some doubt upon that proposition. One court has passed upon a similar proposition and held that it could be sued; another court has lately held that it could not be sued, and cited my opinion, among others, for the position it took. The two questions are not precisely parallel, but I think that they are analogous.

So, the motion to dismiss the ancillary bill of injunction against the State of Missouri will be sustained.

St. Louis, Missouri, November 2, 1931.

[fol. 17] IN UNITED STATES DISTRICT COURT

NOTICE TO TAKE UP INTERVENING PETITION OF THE STATE OF MISSOURI—Filed Nov. 27, 1931

To Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, Otto B. Franz, Gustav A. Franz, Sherman H. Kleinschmidt, and Helen Kleinschmidt, defendants in the above-entitled cause, or Buder & Buder, their attorneys of record:

That on the 7th day of December, 1931, at ten o'clock A. M. or as soon thereafter as it may be heard, the inter-

vener, State of Missouri, will present its intervening petition to this Court for the entry of the order therein prayed or any other conforming with the proof.

Stratton Shartel, Henry Stern, Richmond C. Coburn,
Attorneys for Intervener, State of Missouri.

Copy of the foregoing received this 27th day of November, 1931.

(Signed) Buder & Buder.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING CAUSE OF ACTION OF JOHANNA F. FISKE, AMANDA F. WHEELER, HENRIETTA A. HOLDOWAY, ADELAIDE ZIMMERMAN, AND OTTO B. FRANZ UPON THEIR ANCILLARY BILL OF COMPLAINT FOR AN INJUNCTION, ETC.—Dec. 3, 1931

The motion of the State of Missouri to dismiss the ancillary and supplemental bill of complaint of Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern having been heretofore sustained on the 2nd day of November, 1931, and it now appearing to the satisfaction of the Court that said defendants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz have refused and declined to plead further upon said [fol. 18] matter, it is ordered that the cause of action of said defendants for an injunction, as aforesaid, be and it is hereby dismissed and a final judgment and decree entered thereon in favor of the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern and against Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman and Otto B. Franz.

C. B. Faris, Judge.

Dated Dec. 3d, 1931.

3—27

In United States District Court

Petition of Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmerman, and Otto B. Franz for an Appeal—Filed Dec. 3, 1931

Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz, defendants in the above entitled cause, deeming themselves aggrieved by the order and decree made, rendered and entered herein on November 2, 1931, dismissing their ancillary and supplemental bill of complaint for an injunction, and the final judgment and decree rendered and entered pursuant thereto on the third day of December, 1931, and by the proceedings in this cause, by their solicitors file herewith their assignment of errors and pray that they be allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

Buder & Buder, Solicitors for Petitioners.

In United States District Court

Order Granting Appeal—Filed Dec. 3, 1931

Now on this day come Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B, Franz, defendants in the above entitled cause, and file herein their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order and decree made, rendered and entered herein on November 2, 1931, dismissing their ancillary and supplemental bill of complaint for an injunction, the final judgment and decree this day rendered and entered pursuant thereto and the proceedings in [fol. 19] this cause, together with their assignment of errors on such proposed appeal, upon consideration whereof it is ordered that an appeal be, and it is hereby, allowed said defendants as prayed upon their giving a bond for costs in the sum of Five Hundred Dollars ($500.00).

And now said defendants present herein their cost bond on appeal in the penal sum of Five Hundred Dollars

($500.00), which bond is duly approved and filed and a citation issued.

C. B. Faris, Judge.

Dated Dec. 3d, 1931.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS BY JOHANNA F. FISKE, AMANDA F. WHEELER, HENRIETTA A. HOLDOWAY, ADELAIDE ZIMMERMANN, AND OTTO B. FRANZ—Filed Dec. 3, 1931

Come now defendants, Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz, and file this, their assignment of errors in, to and upon the order and decree made, rendered and entered by the Court herein on the 2nd day of November, 1931, and the final judgment and decree rendered and entered pursuant thereto on the third day of December, 1931, and in the record and proceeding in the above entitled cause; and they further aver, allege and state the fact to be that there is harmful and manifest error herein in the following particulars, to-wit:

1. The District Court erred in sustaining the motion of the State of Missouri to dismiss the ancillary and supplemental bill of complaint of these defendants for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern, to prevent them from prosecuting further in the Probate Court of the City of St. Louis, State of Missouri, the citation against G. A. Buder, as the Executor of the Estate of Sophie Franz, deceased, to require him to inventory as part of said estate certain stock dividends of the Burroughs Adding Machine Company heretofore held by this Court to belong to the Estate of Ehrhardt D. Franz, deceased.

2. The District Court erred in dismissing the ancillary and supplemental bill of complaint of these defendants for [fol. 20] an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H.

Stern, to prevent them from prosecuting further in the Probate Court of the City of St. Louis, State of Missouri, the citation against G. A. Buder, as the Executor of the Estate of Sophie Franz, deceased, to require him to inventory as part of said estate certain stock dividends of the Burroughs Adding Machine Company heretofore held by this Court to belong to the Estate of Ehrhardt D. Franz, deceased.

3. The District Court erred in failing and refusing to overrule the motion of the State of Missouri to dismiss the ancillary and supplemental bill of complaint of these defendants for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern, to prevent them from prosecuting further in the Probate Court of the City of St. Louis, State of Missouri, the citation against G. A. Buder, as the Executor of the Estate of Sophie Franz, deceased, to require him to inventory as part of said estate certain stock dividends of the Burroughs Adding Machine Company heretofore held by this Court to belong to the Estate of Ehrhardt D. Franz, deceased.

4. The District Court erred in making, rendering and entering the order and decree in this cause made, rendered and entered on the 2nd day of November, 1931.

5. The District Court erred in finding, ordering, adjudging and decreeing that the State of Missouri was merely a defendant pro interesse suo, and as such had not waived its immunity from suit and had not submitted to the jurisdiction of the District Court or consented to be sued.

6. The District Court erred in failing and refusing to order, adjudge and decree that the State of Missouri had waived its immunity from suit and had submitted to the jurisdiction of this Court by reason of filing herein its intervening petitions on the 1st day of June, 1931, and the 6th day of June, 1931, respectively.

7. The District Court erred in failing and refusing to order, adjudge and decree that the State of Missouri had waived its immunity from suit by voluntarily becoming a

party to this cause and submitting its rights for judicial determination.

[fol. 21] 8. The District Court erred in finding, ordering, adjudging and decreeing that it had acquired and possessed no jurisdiction over the State of Missouri in this cause and in finding, ordering, adjudging and decreeing that the State of Missouri was not subject to the injunctive powers of the District Court to preserve and protect its jurisdiction over this cause.

(Signed) Buder & Buder, Solicitors for Appellants.

Bond on appeal for $500.00, approved and filed December 3, 1931, omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Dec. 4, 1931

The Clerk of the District Court is requested to copy for transmission to the United States Court of Appeals upon the appeal of Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz from the order and decree made, rendered and entered herein on November 2, 1931, the following portions of the record of this cause:

1. The intervening petition of the State of Missouri filed herein on the 1st day of June, 1931.

2. The order of the District Court made and entered on the 1st day of June, 1931, granting the application of the State of Missouri to intervene as a party defendant in this cause and allowing said State of Missouri five days within which to file its formal intervening petition.

[fol. 23] 3. The intervening petition of the State of Missouri filed herein on the 6th day of June, 1931.

4. The ancillary and supplementary bill of complaint for an injunction filed herein by Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz on the 10th day of June, 1931.

5. The answer of Johanna F. Fiske, et al., to the intervening petition of the State of Missouri, filed herein on the 15th day of June, 1931.

6. The motion of the State of Missouri filed herein on the 29th day of June, 1931, to dismiss the ancillary and supplemental bill of complaint for an injunction theretofore filed herein by Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz, together with the order of submission on July 1, 1931.

7. The order and decree of the District Court made, rendered and entered on the 2nd day of November, 1931, sustaining the motion of the State of Missouri to dismiss the ancillary and supplemental bill of complaint for an injunction theretofore filed herein by Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz.

8. The memorandum filed herein on the 19th day of November, 1931, of the oral opinion of the District Court theretofore delivered on the 2nd day of November, 1931.

9. The notice of the State of Missouri filed herein on the 27th day of November, 1931, to docket its intervening petition.

10. Refusal of defendants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz to plead further upon the matter of their ancillary bill for an injunction against the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern, announced on the 3rd day of December, 1931.

11. The final order, judgment and decree made and entered on the 3rd day of December, 1931, against defendants Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz upon their said ancillary bill for an injunction.

[fols. 24 & 25] 12. The formal appeal papers pertaining to the instant appeal.

(Signed) Buder & Buder, Solicitors for Appellants.

Receipt of copy of the foregoing præcipe for transcript acknowledged this 4th day of December, 1931.

Stratton Shartel, Attorney General of State of Missouri. Richmond C. Coburn. Franklin Miller, Circuit Attorney, by Frank X. Reller, Chief Clerk.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD ON APPEAL—Filed Jan. 12, 1932

Upon application, and for good cause shown, it is Ordered that the time for lodging the transcript of record in the United States Circuit Court of Appeals for the Eighth Circuit be, and the same is hereby extended to and including February 10, 1932.

C. B. Faris, U. S. District Judge.

Jan. 12, 1932.

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 26 & 27] Appearances of counsel omitted in printing.

[fol. 28] Minute entry of argument and submission, May 17, 1932, omitted in printing.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1932

No. 9428.

JOHANNA F. FISKE et al., Appellants,

vs.

STATE OF MISSOURI et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Missouri

Mr. G. A. Buder, Jr. (Mr. O. E. Buder was with him on the brief); for appellants.

Mr. Henry H. Stern, Special Assistant Attorney-General, State of Missouri (Mr. Stratton Shartel, Attorney-General, State of Missouri, and Mr. Richmond C. Coburn, Special

Assistant Attorney-General, State of Missouri, were with him on the brief), for appellees.

Before Stone, Kenyon, and Van Valkenburgh, Circuit Judges

OPINION—Filed Nov. 26, 1932

STONE, Circuit Judge, delivered the opinion of the court:

Ehrhardt D. Franz left a testate estate to his wife, Sophie, and their ten children. A portion thereof later passed into a trust with the same persons as beneficiaries. Extended litigation developed, wherein, three and one-third of the ten interests represented by the children were arrayed against Sophie, the trustees and six and two-thirds of the children interests. The history, issues and results of that litigation are set forth in opinions in the various [fol. 30] appeals to this court.[1] For the present, it is helpful to note only that the litigation determined the interests of all parties to the trust to be (as far as pertinent here) that Sophie Franz had a life interest in the income from the trust which would terminate at her death and then the corpus be distributable by the trustees to the other beneficiaries. This applied to shares of stock of the Burroughs Adding Machine Company which were the main part of the trust estate. Sophie Franz died. Various of the beneficiaries have moved for distribution of the trust estate. The testate estate of Sophie is in course of administration in a probate court of Missouri. The State is entitled to collect inheritance taxes upon the estate of Sophie passing to her devisees. The appellants here represent five of the six and two-thirds children interests and were some of the defendants in this litigation and all are non-residents of Missouri.

Claiming that these six and two-thirds interests in the Burroughs stock held in the trust estate were subject to inheritance taxes as part of the estate of Sophie; that they had not been inventoried in her estate and that the State

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[1] 11 Fed. (2d) 854; 11 Fed.(2d) 858; 15 Fed. (2d) 797; 27 Fed. (2d) 101; 34 Fed. (2d) 353; 38 Fed. (2d) 605; 47 Fed. (2d) 507; 51 Fed. (2d) 1047.

had a lien thereon for such taxes, the State was given leave to intervene in this litigation. It filed its petition in intervention wherein it prays that a portion of this stock be transferred from the trustees to the court registry to secure the inheritance taxes thereon and be held "until it may be determined in the Probate Court of the City of St. Louis whether such stock should have been inventoried therein" as part of the Sophie Franz estate.

Shortly after the petition in intervention was filed, the representatives of five of the above six and two-thirds children interests filed their "Ancillary and Supplemental Bill of Complaint for an Injunction". This bill was directed at "the State of Missouri, Stratton Shartel, Attorney General of the State of Missouri, Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri, Richmond C. Coburn and Henry H. Stern"—the last two being attorneys for the State in connection with inheritance taxes in the Sophie Franz estate. This bill alleged that the State and the other parties, as its attorneys, had caused to be served on the executor of the Sophie Franz estate a citation from [fol. 31] the Probate Court intended to discover and have inventoried as a part of such estate the Burroughs stock in the trust estate belonging to them; that such action was contrary to the decree of the trial court adjudging them entitled to receive this stock from the trustees and that the respondents would attempt to obtain orders in the Probate Court which would be "adverse and prejudicial to the rights and interests of the above named plaintiffs in this cause in this Court and orders, decrees and judgments which will prejudicially affect, impair and defeat the jurisdiction of this Honorable Court and the decree rendered by it in the premises." The prayer for restraint was from "directly or indirectly prosecuting further the said citation * * * and particularly from seeking or obtaining any order, decree or judgment therein until the further direction of this Honorable Court" and for temporary relief.

Thereafter, the State, specially appearing, filed its motion to dismiss the ancillary and supplemental bill on the grounds that it failed to state facts warranting the relief; that it was an action against the State which had not consented to be sued, in violation of the Eleventh Amendment;

that it sought to enjoin proceedings in a State court, in violation of Section 265 of the Code (U. S. C. A. Title 28, Section 729), and sought to interfere with the proper administration of an estate in the State probate court.

The trial court sustained the motion on the ground that the Eleventh Amendment prevented the action without the consent of the State and that the State had neither consented nor waived its rights to such immunity. Declining to plead further, an order was entered dismissing the ancillary and supplemental bill. This appeal is from that order.

Three issues are presented on this appeal, as follows: did the intervention proceedings constitute a waiver by the State of its immunity under the Eleventh Amendment; if no waiver, is this action within the immunity of the Amendment; is this action within the protection of Section 265 of the Code?

Waiver

The immunity from suit of a State under the Eleventh Amendment is a personal privilege which may be waived (Gunter v. Atl. Coast L. R. Co., 200 U. S. 273, 284) and this [fol. 32] rule is applicable to an intervention (Clark v. Barnard, 108 U. S. 436, 447-448). The action of the State claimed by appellants to constitute a waiver is its intervention in this main case. Appellees oppose that such is not the effect of the intervention. The motion of the State for leave to intervene prayed that it be permitted so to do as "a party defendant herein". Standing alone this would strongly suggest that the intervention was to be of a character which would constitute a waiver. This is, however, not conclusive. The petition in intervention must be examined to ascertain what right or remedy the State was seeking to obtain from the federal court. The substance of that petition is that certain stock of appellants within the jurisdiction of the federal court was claimed by the State to be derived through the estate of Sophie Franz and, therefore, subject to State inheritance taxes; that the State had a lien thereon for such taxes; that the stock had not been included in the inventory of the Sophie Franz estate in the probate court; that citation of the executor to show why this stock was not included had been issued and that matter would be determined in the probate court; that

these appellants have moved for distribution to them by the federal court. On the situation thus set out, the prayer is that a portion of this stock be transferred from the trustees to the registry of the court "to secure the assessment and collection" of the inheritance taxes and to be there held "until it may be determined in the probate court * * * whether said stock should have been inventoried therein" by the executor of the Sophie Franz estate. The State seeks no determination of any rights or title but expressly pleads that such determination will take place in the probate court. The only relief asked is that the federal court do not distribute this stock from the trustees to appellants but place it in its registry to abide the result of the determination of the rights of the State by the probate court. Obviously, the only purposes and possible results of the intervention would be to retain the stock within Missouri and in a place where it could be made to respond to the tax claims of the State if these claims (then being pressed in the probate court but undetermined) should be upheld. The substance of the relief sought is the temporary retention of custody by the federal court. This situation is essentially different from the statement in Cunningham v. Macon and Brunswick R. Co., 109 U. S. 446, 452 (relied upon by appellants) to [fol. 33] the effects that the rights of a State "will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court" where the State intervenes and "when she may have a lien or other claim on the property" in the custody of the court. That language had reference to instances where the State seeks to have its lien or claim established and enforced in the federal court having the property affected thereby. Such a case was Clark v. Barnard, 108 U. S. 436, where the State intervened to prosecute a claim to the fund in the custody of the federal court. Here, the State is not seeking any such relief but expressly disavowing it. We are not concerned on this appeal with the propriety of permitting the intervention or with its legal classification (as pro interesse suo or otherwise). The only present pertinency of the intervention is whether it is that character of appearance in the main litigation as will work a waiver of the immunity of the Amendment. Here the only thing sought is the temporary impounding of this stock

so that it may, possibly, be subjected to a lien which the State hopes to establish in another tribunal. Such action sought from the federal court is in no sense a matter of right but rather partakes of grace. No right of the State is sought to be presented to or determined by the federal court. We think this limited character of appearance in a federal court by a State cannot be regarded as a waiver of the immunity given by the Amendment.

Interference with Federal Jurisdiction

The basis of appellants' bill is that the respondents are seeking to invade the exclusive jurisdiction of the federal court and affect the decrees therein injuriously to their rights thereunder. Respondents deny any such intention or effect. It is necessary to determine this matter before we take up the effects of the Eleventh Amendment and of Section 265 of the Code.

The ancillary bill alleges and the motion to dismiss admits, for the purposes of the motion, that the rights and interests of these appellants in this Burroughs stock have been adjudicated in the federal court and they are entitled to distribution from the trustees after certain charges in [fol. 34] connection with the trust are satisfied. There is a similar admission that the proceedings in the probate court are designed to and may result in a determination of these same rights and interests which will be contrary to the result in the decrees of the federal court. These legal admissions are sufficient to establish, for the purposes of this appeal, that the State is claiming the right to relitigate in the probate court issues determined in the federal court. However, the State contends here it is doing nothing of the kind. It contends that the rights of only the plaintiffs in the main case were determined. Both parties have gone beyond the immediate pleadings in their presentation of this matter. Possibly we should abide by these pleadings, but since the parties have taken this excursion and since the questions here are of grave public consequence, we think it well to follow them so that our determination may rest upon the actualities of the real situation. We are further encouraged to do this because we can find the solution in our own opinions in various of the appeals in the main case. Therefore, we will inquire whether the contemplated action of the State in the probate court is designed to relitigate issues

concerning the interests of these appellants in this stock which have already been determined in the federal court. It is entirely true that the interests of these appellants are not formally and specifically declared in any of the decrees brought to our attention in the litigation and that prior to the third appeal (Buder v. Franz, 27 Fed. (2d) 101) they were contesting the position of the plaintiffs. That, however, is not determinative.

When this litigation started, none of these remaindermen were parties thereto. On the first appeal (Franz v. Buder, 11 Fed. (2d) 854), this court determined that the present appellants were "indispensable" parties to the litigation because the action was in the nature of an action in rem and concerned a res in which they were legally interested. It was because of our determination on that appeal that they were brought into the litigation. In that first appeal, jurisdiction of the res, which meant the trust estate, was decided to be the sole basis for retaining jurisdiction in this entire litigation, and that jurisdiction was, in that first opinion, declared to be "exclusive" and as involving "the potential necessity of assuming control of that property for the purpose of enforcing any decree that may be rendered, and of [fol. 35] preventing any disposition of the property that may impair the efficacy of that decree" (11 Fed. (2d), at 859).

Having established the jurisdiction to the res, and the litigation being over the rights of all parties thereto in the res, it was inevitable that the basis of the court's determination should apply with equal force to all parties. This situation is not only self-evident, but it is directly expressed in several of the opinions in these various appeals: In the second appeal (Franz v. Franz, 15 Fed. (2d) 797, 800), this court said: "While in the original bill the plaintiff only sought to establish and protect his undivided remainder interest, the fundamental questions of fact and law which would determine the extent of the plaintiff's remainder interests would likewise determine and affect the other remainder interests, and a decision adverse to the plaintiff, although it would not bind the owners of other remainder interests, would cast a cloud on their title, and for that reason we held the court ought not to proceed in their absence." On the third appeal (Buder v. Franz, 27 Fed. (2d) 101, page 114), this court said:

"In short, all of this Burroughs stock here involved is corpus in which Sophie Franz has only a life estate."

Also, several times there have been direct expressions concerning the effect of our decision on the merits upon the question of administration of any part of this Burroughs stock as a part of the estate of Sophie Franz. On the third appeal (Buder v. Franz, 27 Fed. (2d) 101, 108), after quoting from a provision in the trust agreement requiring "all" of the trust property to be administered in the estate of Sophie Franz upon her death, this court said: "If this quoted provision were followed, all of this property would be subject to various taxes, fees and costs (in course of such administration) which should not attach to any of such property belonging to the remaindermen because such would be deliverable direct to them by the trustees, upon termination of the life estate, and would not pass through the administration of the estate of Sophie Franz." In the same opinion (page 114), is:

"With the termination of the trust by her death, her absolute property will pass to administration (testate or intestate). As her death will likewise terminate the life estate, the remaindermen will, thereupon, be entitled to receive direct from the trustees the property not belonging to Sophie Franz absolutely—such property has no relation to her [fol. 36] absolute property and no administration can be had upon it."

On the fourth appeal (Franz v. Buder, 34 Fed. (2d) 353-356), this court said:

"At the death of Sophie Franz, the corpus of that part of the trust estate which she derived from the estate of her deceased husband will be divided in accordance with the provisions of the will of Ehrhardt D. Franz; while the rest of the trust estate will be divided and distributed according to the provisions of the will of Sophie Franz, or if she die intestate, then in accordance with the statutes of descent and distribution of the state of her domicile."

All of the above language was directly and particularly applicable to the stock in the Burroughs Adding Machine Company involved in the present intervention.

From this history of the main litigation it is clear that the rights and interests of these appellants in this stock were involved in and determined in the federal court. Therefore, it must be evident that the contemplated action of the State in the probate court must have the purpose to relitigate this very matter. Unless the State can there obtain a result directly opposed to the determination of the federal court, it will completely fail in its purpose. There could be no plainer case of interference with the jurisdiction of a court and defeat of its decrees entered within its jurisdiction.

The Eleventh Amendment

The question here is: Does the Eleventh Amendment deny jurisdiction to a federal court in an action by individuals against a State where the sole purpose and effect of such action is to protect the decrees of the federal court entered in a cause wherein it had jurisdiction?

This involves examination of the scope of that Amendment. The Amendment does not stand alone and no construction of its meaning is based upon such hypothesis can be sound. It is only a part of the Constitution and must be construed as such. Like all instruments, the Constitution is subject to the rational rule of construction that the parts must be understood in relation to each other and to the entirety in order to preserve the fullest vitality of the whole instrument in all of its parts. "It cannot be presumed, that any clause in the Constitution is intended to be without effect * * *, unless the words require it" (Marbury v. [fol. 37] Madison, 1 Cranch 137, *174; Prout v. Starr, 188 U. S. 537, 543). Therefore, when some particular clause, in its bare wording, seems to destroy or limit or qualify some other clause, it is the office of the court to examine the involved parts in the light of the entire instrument with a view to preserving such extent of each as can harmoniously live together. Such rule has been applied to this Amendment. In its broad literal meaning—standing alone—this Amendment would prohibit all jurisdiction to any federal court of any case against a State by a citizen of another State or of a foreign state. Such was urged as its meaning in the historic case of Cohens v. Virginia, 6 Wheat. 264, which involved a writ of error to a State court where the plaintiff in error contended that his prosecution under

a State statute was violative of the National Constitution. There, the jurisdiction of the Supreme Court was predicated upon that part of Clause 1 of Section 2 of Article III of the Constitution which declares: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution * *." Against this predicate, it was urged that this was a suit against a State and, therefore, proscribed by the Eleventh Amendment even if it did involve the National Constitution. In one of the greatest opinions of his career, Chief Justice Marshall preserved the full effect both of the clause in Article III and of the Amendment. That construction determined that the meaning of the Amendment was less than its isolated wording. Also, the great Chief Justice reviewed the history and purpose of the Amendment and declared: "* * * It was intended for those cases, and for those only, in which some demand against a State is made by an individual, in the courts of the Union" (*407). In another case (Ex parte State of New York, 256 U. S. 490), the scope of the Amendment was broadened beyond the wording to accord with the spirit thereof—suits in admiralty being adjudged within the Amendment although the wording thereof covered only suits "in law or equity".

The instant case presents the same character of situation. As that case was an examination of the scope of the Amendment in view of a portion of Clause 1, Section 2 of Article III of the Constitution, so this case is an examination of the scope of the Amendment in view of certain portions of Sections 1 and 2 of Article III of the Constitution. The parts [fol. 38] of Article III involved are "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" (Section 1) and "The judicial Power shall extend to all cases, in Law and Equity, * * * between citizens of different States" (Section 2). Under these constitutional sanctions, Congress has created the inferior federal courts and prescribed the extent to which and the conditions under which they shall exercise this "judicial power". Among these prescriptions of judicial power by Congress under the above Constitutional provisions are the grant of jurisdiction to the district courts "of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive

of interest and costs, the sum or value of $3,000, and * * * is between citizens of different States * * *" (U. S. C. A., Title 28, Section 41(1); Judicial Code, Section 24 amended), and that "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law" (U. S. C. A., Title 28, Section 377; Judicial Code, Section 262).

These grants of jurisdiction are within the power given Congress under the clauses of the Constitution above quoted. A part of that granted jurisdiction is the power and the duty to protect that jurisdiction (Kline v. Burke Construction Co., 260 U. S. 226; French v. Hay. 22 Wall. 250, 253). This is not merely a rule of comity but "a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience." (Covell v. Heyman, 111 U. S. 176, 182; Kline v. Burke Constr. Co., 260 U. S. 226, 229). Within that protective power is, of course, the judgments and decrees of federal courts in cases where they possessed jurisdiction to enter them (Dietzsch v. Huidekoper, 103 U. S. 496).

A long unbroken line of decisions in the Supreme Court has put these rules of law beyond challenge. They have been applied in every situation necessitating this protection and to all parties attempting to interfere with an exclusive jurisdiction in the federal courts. There have been two applications (by this court) in the litigation of the main case here (15 Fed. (2d) 797 and 51 Fed. (2d) 1047). Usually, the situation has been that of attempted relitiga-
[fol. 39] tion in the State courts but it has been applied to an Act of a State Legislature (U. S. v. Peters, 5 Cranch 115). Usually, the parties have been private litigants but it has been applied to officials acting solely as State officers (Prout v. Starr, 188 U. S. 537).

The situation here is that a State is seeking to have a federal court, which has full jurisdiction over a res and which has entered its final decrees fully adjudicating the rights of these appellants in that res, transfer to and hold in its registry the property representing the interests of appellants in that res until the State can relitigate, in its own courts, the very issues of interest and title already

determined by the decrees of the federal court. The State is not seeking permission of the federal court to allow this relitigation. Obviously, it contemplates such relitigation. Its purpose in coming into the federal court having the res in jurisdiction is to have that court retain possession thereof so that if the State litigation results in a determination contrary to that of the decrees in the federal court, the State will have within its territory property from which it can realize upon this adverse determination. Faced with this threatened violation of their rights under the federal court decree, appellants have filed their ancillary proceeding to enjoin the State from thus disturbing their rights adjudicated and settled in the federal court. To this relief, the State interposes the proposition that the court cannot act because the Eleventh Amendment denies it jurisdiction to act.

Baldly stated, the proposition is that a federal court is stopped by the Amendment from preventing a State going into its own courts and overthrowing a decree which the federal court had jurisdiction to enter and has entered. This is a startling proposition. It cannot harmoniously exist with the conception that the National Constitution has empowered Congress to grant to its established courts an attribute of judicial power which has been universally accorded all American courts (National or State) from the beginning of our present government—even back to the Continental courts before the Confederacy (U. S. v. Peters, 5 Cranch 115).

Here, the State is seeking by action of its executive branch through its courts to annul in part the decrees of a federal court. With this in mind, we may well para-[fol. 40] phrase the language of Chief Justice Marshall merely by substituting "executives and courts" for "legislatures" when he said:

"If the legislatures [executives and courts] of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania [Missouri], not less than the

citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves" (U. S. v. Peters, 5 Cranch 115, 136; quoted with approval in Rhode Island v. Mass., 12 Pet. 657, 751).

If this Amendment may be fairly construed so as to preserve the full vitality of its purpose without producing the unfortunate result apprehended by the great Chief Justice and evident to all, that should be done. To do so is but applying the rule that all provisions of the Constitution are of equal validity (Prout v. Starr, 188 U. S. 537, 543). The purpose of the Amendment was to prevent enforcement of claims against an unwilling State (Cohens v. Virginia, 6 Wheat. 264, *407). This purpose is in no wise aided nor harmed by affecting the effectiveness of a federal court decree in an action between individuals. On the other hand, to admit the proposition that a State is immune from this judicial power in a federal court to protect its lawful jurisdiction and decrees introduces an unhappy element of discord between the Nation and the States, an unfortunate weakening of the legitimate and necessary powers of the federal judiciary and an uncertainty and instability as to private rights. We think the Amendment carries no such poison. It can be given its full intended scope and effect without thus crippling the judicial power provided for in other parts of the Constitution.

Section 265 of the Code

This section provides that no court of the United States shall grant an injunction to stay proceedings in a State court, except where authorized in bankruptcy proceedings (U. S. C. A., Title 28, Section 379). The relief sought by [fol. 41] the ancillary bill is to enjoin the State and its attorneys from proceeding in the probate court—obviously, an injunction "to stay proceedings" in a State court. The Supreme Court has said:

"The restrictions embodied in the section [this section] were, therefore, but a partial accomplishment of the more comprehensive result effectuated by the prohibitions of the Eleventh Amendment. Both the statute and the Amendment relate to the power of courts of the United States to

deal, against the will and consent of a State, with controversies between it and individuals" (Gunter v. Atl. Coast L. R. Co., 200 U. S. 273, 292).

We might well conclude that since the broader Amendment does not prevent an action against a State based upon protection of lawful existing jurisdiction in a federal court, that the narrower statute could go no further. However, there is no reason suggested and we know of none why the statute should be differently applied because of the character of the parties to the litigation in the State court. The character of parties does not enter into the statute. As to the statute alone, a State is like any other party. The decisions are many that this statute does not apply where the stay of proceedings in the State court by injunction is solely to protect the jurisdiction of the federal court.

"It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court" (Kline v. Burke Constr. Co., 260 U. S. 226, 229).

Conclusion

Our conclusion upon the effect of the Eleventh Amendment and of Section 265 of the Code fits accurately into an expression in the Gunter case that "Indeed, the proposition that the Eleventh Amendment, or section 720 of the Revised Statutes [section 265 of the Code], control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion" (200 U. S., at 292). Our conclusion upon the appeal is that the court below erred in dismissing the ancillary and supplemental bill for lack of jurisdiction. The basis of that jurisdiction is the preservation of its own jurisdiction and decrees.

[fol. 42] Since the only issue on this appeal is jurisdiction to entertain the ancillary and supplemental bill, we might rest here. However, it is well to state that the extent to which this jurisdiction should be exercised—possibly, the extent to which it exists—is the protection of the

jurisdiction and decrees of the trial court. This cautionary statement is prompted by an allegation in the petition in intervention. In addition to allegations that appellants had "by pleadings filed in this cause" (the main case) transferred their interests to Sophie Franz, there is the allegation that this was also done 'by diverse acts". What "acts" are meant is not stated. If this means conveyances or anything not considered in the main case, the determination thereof in some other court would not affect the jurisdiction in the main case. It would be foreign to that litigation. However, if all that is meant is something involved in this main litigation (such as the instruments dated January 7 and 30, 1920 (referred to in 27 Fed. (2d) at 110 and 113) or the E. D. Franz Estate matter (referred to in 47 Fed. (2d) at 508), then such "acts" would affect the jurisdiction of the federal court which has already litigated those matters. On the hearing on the merits of the ancillary and supplemental bill the trial court will be informed and can suit its action so as to protect its jurisdiction and that alone.

The cause will be reversed with directions to set aside the orders sustaining the motion to dismiss and dismissing the ancillary and supplemental bill and otherwise to proceed thereafter in accordance with this opinion.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, 1932

No. 9428

JOHANNA F. FISKE, AMANDA F. WHEELER, HENRIETTA A. HOLDOWAY, Adelaide Zimmerman, and Otto B. Franz, Appellants,

vs.

STATE OF MISSOURI, STRATTON SHARTEL, Attorney General of the State of Missouri; Franklin Miller, Circuit Attorney of the City of St. Louis, State of Missouri; Richmond C. Coburn, and Henry H. Stern

DECREE—November 26, 1932

Appeal from the District Court of the United States for the Eastern District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the orders of the said District Court appealed from, in this cause be, and the same are hereby, reversed with costs; and that the appellants have and recover from appellees their costs of appeal herein expended.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to set aside the orders sustaining the motion to dismiss and dismissing the ancillary and supplemental bill and otherwise to proceed thereafter in accordance with the opinion of this Court.

November 26, 1932.

[fols. 44-48] Petition for rehearing, covering five pages, filed December 24, 1932, omitted from this print. It was denied, and nothing more by order of January 17, 1933.

[fol. 49] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—January 17, 1933

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellees.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

January 17, 1933.

[fol. 50] In United States Circuit Court of Appeals, Eighth Circuit

Clerk's Certificate

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries

and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein Johanna F. Fiske, et al., were Appellants and the State of Missouri, et al., were Appellees, No. 9428, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the sixth day of March, A. D. 1933, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Missouri.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fourth day of March, A. D. 1933.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal of United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 15, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,570. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 27. State of Missouri and Franklin Miller, etc., petitioners, vs. Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 15, 1933. File No. 37,570.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No.———

STATE OF MISSOURI et al., PETITIONERS,

v.

JOHANNA F. FISKE et al., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, State of Missouri and Franklin Miller, Circuit Attorney for the City of St. Louis, Missouri, respectfully show as grounds for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals of and for the Eighth Circuit:

A.

Summary Statement of the Matter Involved.

On the first day of June, 1931, after being duly granted leave to intervene (R. 2), the State of Missouri, one of the petitioners herein, filed an intervening petition in a cause then pending in the District Court of the United States of and for the Eastern Division of the Eastern Judicial District of Missouri wherein it was alleged that in the action then pending in said court the respondents herein were seeking distribution of a trust res over which said court had jurisdiction and that a part of said res should be held in the registry of said court until it was determined by the Probate Court of the City of St. Louis, Missouri, whether or not any inheritance taxes were due the State of Missouri (R. 5, 6).

On the 10th day of June, 1931, respondents filed an ancillary and supplemental bill of complaint for an injunction (R. 7) wherein it was alleged that the petitioner, Franklin Miller, among others, was a duly authorized officer and official of the State of Missouri and that the respondents were each the owner of a vested remainder interest in the trust res hereinbefore referred to; that theretofore the petitioner, State of Missouri, by its duly authorized officials, had filed in the state courts of Missouri an affidavit for citation to require the respondent Gustavus A. Buder, as executor of the estate of Sophie Franz, deceased, to inventory a part of said trust res; that said property was the same property of which respondents were the owners and did not belong to the estate of said Sophie Franz and that said matter had already been determined by the district court and, therefore, prayed that an injunction be granted enjoining the State of Missouri and its officers, including the petitioner, Franklin Miller, Circuit Attorney of the City of St. Louis, from directly or indirectly prosecuting further said citation and from seeking or obtaining any order, decree or judgment in the said state courts.

On the 29th day of June, 1931, the petitioner, State of Missouri, filed its motion to dismiss said bill of complaint for an injunction (R. 13) in that the complaint sought to enjoin the State of Missouri contrary to the Eleventh Amendment to the Constitution of the United States. Thereafter, said district court dismissed the said ancillary and supplemental bill of complaint for an injunction (R. 15). Whereupon respondents failed to plead further and said court on the 3rd day of December, 1931, granted its judgment and decree in favor of petitioners.

An appeal was duly taken by respondents to the United States Circuit Court of Appeals for the Eighth Circuit (R. 18) and on the 26th day of November, 1932, the order of said District Court, sustaining the motion to dismiss the ancillary and supplemental bill of complaint for an injunction, was reversed with directions

(R. 35 et seq.). Whereupon your petitioners, the State of Missouri and Franklin Miller, duly filed a petition for rehearing which on the 17th day of January, 1933, was denied by said Circuit Court of Appeals (R. 44).

By the decision rendered by the Circuit Court of Appeals, said court held that although the State of Missouri had not waived its immunity as given to it by the Eleventh Amendment to the Constitution of the United States (R. 30 et seq.), yet the Eleventh Amendment does not deny jurisdiction to a Federal Court in an action by individuals against a state where the sole purpose and effect of such action is to protect the decrees of the Federal Court entered in a cause wherein it had jurisdiction (R. 35 et seq.).

The fundamental question then is whether or not an *exception* is to be ingrafted upon the Eleventh Amendment to the Constitution of the United States by permitting the courts of the United States to enjoin a state in order to protect the decrees of such courts.

B.

Reasons Relied on for Allowance of the Writ.

Your petitioners contend that a Writ of Certiorari should be allowed and that the decision of the Circuit Court of Appeals should be reversed by this Court for these reasons:

1. The decision admittedly denies to the petitioner, the State of Missouri, rights accrued to it by reason of the Eleventh Amendment to the Constitution of the United States unless an exception is to be ingrafted upon said amendment by means of judicial construction.

2. The decision in ruling and holding that the Eleventh Amendment to the Constitution of the United States does not prohibit an individual from commencing or prosecuting an action against one of the United States in a Federal Court where the sole purpose and effect of such action is to protect the decrees of the Federal Court decides an important question of Federal law which has not been, but should be, settled by this Court since it is

a matter involving the sovereignty of a state of the Union.

3. The decision overlooks applicable decisions of this Court, decisions that hold that in an action brought by an individual against a state of the Union a Federal Court does not have jurisdiction unless by the state's voluntary action it has submitted its rights to judicial determination in the Federal Court. (*Gunter v. Atlantic Coast Line Railroad Co.*, 200 U. S. 273, 26 Sup. Ct. 252, 50 Law Ed. 477; *In re State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516.)

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify to and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9428 (In Equity), Johanna F. Fiske et al., Appellants, v. State of Missouri et al., Appellees, and that the said judgment of the said United States Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

STATE OF MISSOURI,
By ROY McKITTRICK,
Attorney General of Missouri,
GILBERT LAMB,
Assistant Attorney General of Missouri,
POWELL B. McHANEY,
Assistant Attorney General of Missouri,
FRANKLIN MILLER,
Circuit Attorney of City of St. Louis, Mo.,
FOREST G. FERRIS, Sr.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. ———

STATE OF MISSOURI et al., *Petitioners*,
v.
JOHANNA F. FISKE et al., *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in Johanna F. Fiske et al. v. State of Missouri et al., 62 Fed. (2d) 150 (R. 28). The District Court's opinion (R. 15) was not reported.

II.

Jurisdiction.

(a) The statutory provision believed to sustain jurisdiction is section 240 of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. Code, Section 347a.

(b) The judgment and decree sought to be reversed was rendered on the 26th day of November, 1932 (R. 41). Petition for rehearing was duly filed on the 24th day of December, 1932 (R. 41) and on the 17th day of January, 1933, said petition for rehearing was denied (R. 44).

(c) The nature of the case the rulings relied upon as the basis of this Court's jurisdiction are shown in the

petition for certiorari hereinbefore set forth and hereinafter in this brief.

(d) Constitutional provisions, statutes, cases and authorities believed to sustain the jurisdiction of this Court are:

Eleventh Amendment to the Constitution of the United States;
William Duhne v. State of New Jersey et al., 251 U. S. 311;
Hans v. State of Louisiana, 134 U. S. 1;
Hughes Federal Practice, Vol. 5, Sec. 304;
Chisolm v. Georgia; 2 Dall 419;
In re Ayers, 123 U. S. 492;
In the matter of the State of New York, 256 U. S. 490;
Fitts v. McGhee, 172 U. S. 516;
Section 2, Article 3 of the Constitution of the United States;
Story on the Constitution, 5th Ed., Vol. 2, P. 482;
Gunter v. Atlantic Coast Line R.R. Co., 200 U. S. 273;
Hoffman v. McClelland, 264 U. S. 552;
Florida v. Georgia, 17 Howard 478;
Georgia v. Jesup, 106 U. S. 458.

III.

Statement of Case.

(In the interest of brevity, petitioners do not here make a statement of the case since a full statement of the case has been given under heading "A" in their petition for Writ of Certiorari at Page 1).

IV.

Specifications of Error.

The assigned errors intended to be urged are:

1. That the United States Circuit Court of Appeals for the Eighth Circuit erred in reversing the order of the District Court dismissing respondents' ancillary and supplementary bill for an injunction on the ground that

the Eleventh Amendment did not deny jurisdiction to a Federal Court in an action by individuals against a state where the sole purpose and effect of such action was to protect the decrees of the Federal Court entered in a cause wherein it had jurisdiction.

2. That the United States Circuit Court of Appeals for the Eighth Circuit erred in reversing the order of the District Court dismissing respondents' ancillary and supplementary bill for an injunction for the reason that an injunction enjoining the State of Missouri with others violates the Eleventh Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT.

Point A.

THE ACTUAL WORDS USED IN THE ELEVENTH AMENDMENT PERMIT NO EXCEPTIONS OF THE KIND AND CHARACTER INGRAFTED UPON IT BY THE LEARNED CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Point B.

THE HISTORY OF THE ELEVENTH AMENDMENT INDICATES THAT ITS OBJECT AND PURPOSE WAS TO PREVENT THE INDIGNITY OF SUBJECTING A STATE FROM BEING SUED AT THE INSTANCE OF PRIVATE INDIVIDUALS.

Point C.

UNLESS A STATE CONSENTS THERETO, IT CANNOT BE SUED BY A CITIZEN OF ANOTHER STATE.

Point D.

THE PETITIONERS IN THE INSTANT CAUSE HAVE NOT WAIVED THE IMMUNITY GRANTED THEM BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES NOR HAVE THEY CONSENTED TO THE JURISDICTION OF THE FEDERAL COURTS.

Point E.

ALL REPORTED AUTHORITY IS OPPOSED TO THE DECISION RENDERED BY THE COURT BELOW.

ARGUMENT.

Point A.

THE ACTUAL WORDS USED IN THE ELEVENTH AMENDMENT PERMIT NO EXCEPTIONS OF THE KIND AND CHARACTER INGRAFTED UPON IT BY THE LEARNED CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Eleventh Amendment to the Constitution provides that:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state."

It is plain and indisputable from a consideration of the actual words used in the above amendment that the Federal judiciary does not have jurisdiction to entertain a suit in equity brought by a citizen of another state against one of the several states of the United States; and this fact was recognized by the learned Court below (R. 35).

Point B.

THE HISTORY OF THE ELEVENTH AMENDMENT INDICATES THAT ITS OBJECT AND PURPOSE WAS TO PREVENT THE INDIGNITY OF SUBJECTING A STATE FROM BEING SUED AT THE INSTANCE OF PRIVATE INDIVIDUALS.

1. It has been said by this Court that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. *William Duhne v. State of New Jersey et al.*, 251 U. S. 311; *Hans v. State of Louisiana*, 134 U. S. 1; *Hughes Federal Practice*, Vol. 5, Sec. 304.

The failure of the makers of our Constitution to make provision for a citizen bringing suit against his own state can be, no doubt, attributed to the fact that the Law of Nations as well as the English Common Law has always been that *a state cannot be sued without its consent. Chisolm v. Georgia*, 2 Dall 419; *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516.

2. But Section 2 of Article 3 of the Constitution of the United States provides that:

> "The judicial powers shall extend to all cases in law and equity arising under this Constitution, the laws of the United States * * *; to controversies to which the United States shall be a party; to controversies between two or more states; *between a state and citizens of another state* * * * and between a state or the citizens thereof and foreign states, citizens or subjects."

and under this provision of the Constitution, this Court in the case of *Chisolm v. Georgia*, 2 Dall 419, held that Chisolm, a citizen of the State of South Carolina, could bring an action in the Federal Courts against the State of Georgia. Whether or not the majority of the Court in that case erred in accepting the literal construction of the above section of the Constitution has long been subject to controversy among jurists and legal theorists. *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516; *Hughes Federal Practice*, Vol. 5, p. 223 et seq. But for our purposes, it is sufficient to say that the above decision constituted a new and novel precedent in holding that a state could be sued by an individual. (See cases cited supra.)

3. The decision of *Chisolm v. Georgia* was rendered on the 18th day of February, 1793, and the Eleventh Amendment to the Constitution of the United States was proposed on the 2nd day of December, 1793, and declared adopted on January 8, 1798, thereby indicating

that said amendment was passed in order to overrule said decision of this Court. *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516; *Hans v. State of Louisiana*, 134 U. S. 1; *Story on the Constitution*, 5th Ed., Vol. 2, p. 482.

Since a state cannot be sued by one of its own citizens, since the purpose of the Eleventh Amendment was to overrule in effect the decision of *Chisolm v. Georgia* in its construction of Section 2 of Article 3 of the Constitution of the United States, it would appear, therefore, that the purpose of the Eleventh Amendment was to place the several states of the Union, so far as suits *against* them by individuals are concerned, in the same position as they were in before Section 2 of Article 3 of the Constitution of the United States was adopted, i. e., all suits *against* a state are prohibited from being commenced or prosecuted by an individual in tne Federal courts.

Point C.

UNLESS A STATE CONSENTS THERETO, IT CANNOT BE SUED BY A CITIZEN OF ANOTHER STATE.

Until the decision in the instant cause was rendered by the Circuit Court of Appeals, it had been consistently recognized by all courts, in line with the express language of the amendment and its purpose as hereinabove set forth, that the Federal judiciary had no jurisdiction to entertain an action commenced or prosecuted against a state by a citizen of another state. *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516; *Gunter v. Atlantic Coast Line Rr. Co.*, 200 U. S. 273; *Hughes Federal Practice*, Vol. 5, p. 223, et seq. Of course, where a state consents to the jurisdiction of the Federal courts and thereby waives the immunity granted it by the Eleventh Amendment to the Constitution, by a long line of decisions, the Federal courts have jurisdiction of such con-

troversies even though they are instituted and prosecuted at the instance of individuals, citizens of another state. *In re Ayers*, 123 U. S. 492; *In the matter of the State of New York*, 256 U. S. 490; *Fitts v. McGhee*, 172 U. S. 516; *Gunter v. Atlantic Coast Line Rr. Co.*, 200 U. S. 273; *Hughes Federal Practice*, Vol. 5, P. 223 et seq.

Point D.

THE PETITIONERS IN THE INSTANT CAUSE HAVE NOT WAIVED THE IMMUNITY GRANTED THEM BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES NOR HAVE THEY CONSENTED TO THE JURISDICTION OF THE FEDERAL COURTS.

That the petitioners have not waived the immunity granted them by the Eleventh Amendment to the Constitution nor have they consented to the jurisdiction of the Federal courts was freely conceded by the learned Court below (R. 30 et seq.). This ruling of the Court below was correctly predicated upon the theory that the petitioner, State of Missouri, by intervening, sought no determination of any right or title to the stock belonging to the trust res involved in the litigation then pending in such court but desired only to place such stock in the Court's registry to abide the result of the determination of the rights of the petitioners in the state courts —this in line with the decisions of *Hoffman v. McClelland*, 264 U. S. 552; *Florida v. Georgia*, 17 Howard 478; *Georgia v. Jesup*, 106 U. S. 458.

Point E.

ALL REPORTED AUTHORITY IS OPPOSED TO THE DECISION RENDERED BY THE COURT BELOW.

We have heretofore cited pertinent decisions bearing upon the question of the immunity of a state under the Eleventh Amendment—all of them agree that only by a state's consent through waiver or otherwise can a private

individual citizen of another state institute or prosecute an action against a state of the Union in a Federal court, yet the lower Court admittedly enlarged the scope of the amendment (R. 35) to coincide with the rule of law expressed in *Kline v. Burke Construction Co.*, 260 U. S. 226, and similar cases—cases that, in no way, concern the Eleventh Amendment. The rule of law espoused in the Kline case and similar cases depends upon the court *having jurisdiction* of the parties—no such barrier as the Eleventh Amendment to the Constitution stood between the court and the rendition of those decisions.

The Court below also cites as authority for its position the case of *Gunter v. Atlantic Coast L. R. Co.*, 200 U. S. 273, but the decision of that case instead of approving the position of the lower court herein affirms the position of the petitioners herein, for it is there said, l. c. 283:

> "In deciding whether the state and its attorney-general were privies to the Pegues decree, some elementary propositions must be borne in mind.
>
> a. In view of the prohibitions of the Eleventh Amendment to the Constitution of the United States, **a state, without its consent, may not be sued by an individual in a circuit court of the United States.**
>
> * * *
>
> c. Although a state may not be sued without its consent, such immunity is a privilege which may be waived and hence, where a state voluntarily become a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment (Clark v. Barnard, 108, U. S. 436, 447, 27 L. ed. 780, 784, 2 Sup. Ct. Rep. 878)."

The Court then concluded that in the Pegues case the state had submitted to the jurisdiction of the Federal Court. The Gunter case and no other case yet decided by any court in the United States has held in accordance with the decision rendered by the lower Court herein.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that this Court should issue a Writ of Certiorari herein.

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FILE COPY

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CHARLES ELMORE CRO
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 27.

STATE OF MISSOURI et al., Petitioners,

vs.

JOHANNA F. FISKE et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS.

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BRIEF FOR THE RESPONDENTS.

STATEMENT FOR THE RESPONDENTS.

This case comes before the Court on a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of Johanna F. Fiske et al. v. State of Missouri et al. (R. 23), which was handed down on November 26, 1932 (R. 37) and is reported in 62 Fed. (2d) 150. The Circuit Court of Ap-

peals reversed an order of the United States District Court for the Eastern District of Missouri (R. 17) dismissing the ancillary bill (R. 6) filed by the respondents herein, seeking to enjoin the State of Missouri from attempting to obtain in its own courts orders, judgments and decrees contrary to those which had been entered by the federal courts in the main litigation over a period of years, beginning with its inception in the District Court at St. Louis in March, 1924. Since that time numerous phases of the case have received the attention of the trial court and many have been passed upon by the Circuit Court of Appeals. If desired, the history of the litigation may be reviewed by referring to the following opinions of the Circuit Court of Appeals:

Franz et al. v. Buder, 11 Fed. (2nd) 854 and 858;
Franz v. Franz, 15 Fed. (2nd) 797;
Buder et al. v. Franz et al., 27 Fed. (2nd) 101;
Mississippi Valley Trust Co. v. Buder et al., 34 Fed. (2nd) 353;
Franz v. Buder, 34 Fed. (2nd) 353;
Franz v. Buder et al., 38 Fed. (2nd) 605;
Mississippi Valley Trust Co. v. Buder et al., 47 Fed. (2nd) 507;
Mississippi Valley Trust Company v. Franz, 51 Fed. (2nd) 1047.

The present respondents, Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide Zimmermann and Otto B. Franz, have been parties to the litigation

since the filing of the amended bill of complaint on March 30, 1926. They are five of the ten remaindermen mentioned in the last will and testament of their deceased father, who died in 1898 (27 Fed. [2nd], l. c. 103).

Petitioner, State of Missouri, not theretofore a party to the suit, filed its motion in the United States District Court for leave to intervene as a party defendant in the principal case on June 1, 1931 (R. 2), and obtained an order granting its application for leave to so intervene as a defendant (R. 1-2). The alleged interest of the State as a claimant of inheritance taxes is advanced as the basis for its intervention.

The main points at issue in the Franz estate litigation were decided in Buder et al. v. Franz et al., 27 Fed. (2nd) 101, it being there decided that the remainder interests, created by and granted under the will of Ehrhardt D. Franz, deceased (27 Fed. [2nd], l. c. 103), were still in existence, and that certain stock dividends of the Burroughs Adding Machine Company were corpus inuring to the benefit of such remainder interests and did not belong to the life tenant, Sophie Franz.

Sophie Franz, the life tenant, died on April 14, 1930, leaving a will, which was duly probated in the Probate Court of the City of St. Louis, Missouri, in which will she named as her executor C. A. Buder, who has duly qualified and is now so acting (R. 5, 10).

In due time the said executor of the estate of Sophie Franz, deceased, filed in the Probate Court of the City

of St. Louis his inventory in said estate, but in compliance with the opinion of the Circuit Court of Appeals in Buder v. Franz, 27 Fed. (2nd) 101, l. c. 114, did not include in said inventory any of the Burroughs Adding Machine stock adjudged to constitute a part of the estate of Ehrhardt D. Franz, deceased. Thereupon, Franklin Miller, Circuit Attorney of the City of St. Louis, one of the petitioners herein, filed on behalf of the State of Missouri, in said Probate Court, a citation to compel said executor to inventory as an asset of the estate of Sophie Franz, deceased, 188,333⅓ shares of no par value common stock of the Burroughs Adding Machine Company (held by the lower courts not to belong to said Sophie Franz [27 Fed. (2nd) 101]), in order that an inheritance tax might be assessed and collected on such stock as being a part of the estate of Sophie Franz, deceased (R. 2, 8).

Following the issuance of said citation the State of Missouri, through its representatives, filed a petition in the United States District Court for leave to intervene in the principal case "as a party defendant" to file proper pleading in opposition to the motion of Gustavus A. Buder and Gustav A. Franz, trustees, and Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmermann, Sherman H. Kleinschmidt and Helen Kleinschmidt" for distribution of said estate (R. 4). The prayer of said petition is "that an order be entered making the State of Missouri a party defendant herein" (R. 4).

Pursuant to such prayer the United States District Court granted said petition and entered its order allowing the State of Missouri the right to so intervene (R. 1-2).

Thereupon the said intervening petition of the State of Missouri was filed on the 6th day of June, 1931, in which petition it is alleged that "the State of Missouri, since the date of the death of said Sophie Franz, to wit, May 13, 1930, has had and now has a lien upon said stock for said taxes," and praying that a portion of said stock be transferred by the trustees to the registry of the District Court for the protection of said lien (R. 4, 5, 6).

Thereafter, on June 10, 1931, respondents herein filed in said District Court their ancillary and supplemental bill of complaint for an injunction (R. 6), whereby they sought to restrain the State of Missouri and its representatives from prosecuting in the Probate Court of the City of St. Louis the aforementioned application to require the executor of Sophie Franz to inventory the above-mentioned Burroughs Adding Machine stock as an asset of her estate (R. 8, 9). Said ancillary bill had for its purpose the protection and preservation of the jurisdiction of the District Court (R. 9), as had been done in Franz v. Franz, 15 Fed. (2nd) 797.

Appellants also answered the State's intervening petition on June 15, 1931 (R. 9).

The State moved, on June 29, 1931, to dismiss the ancillary and supplemental bill for an injunction filed by respondents herein (R. 12). On November 2, 1931, said

motion to dismiss was sustained (R. 14), an oral opinion being delivered, a memorandum of which was later filed (R. 15).

The said motion to dismiss was sustained solely upon the ground that the State of Missouri, as a sovereign power, was not subject to the injunctive process of the District Court. The matter was disposed of on the pleadings alone, no testimony having at any time been heard on the ancillary bill. The plaintiffs in the ancillary bill (these respondents) having declined to plead further, the Court, on December 3, 1931, dismissed their cause of action for an injunction and rendered a final judgment in favor of the defendants in the ancillary bill (R. 17).

Thereupon an appeal was duly allowed to the Circuit Court of Appeals for the Eighth Circuit (R. 18), which appeal resulted in the opinion and decree herein complained of by the petitioners.

SUMMARY OF THE ARGUMENT.

I.

Where a court of the United States is acting in a manner ancillary to a decree which it has rendered in a cause over which it had jurisdiction, the Eleventh Amendment to the Constitution of the United States does not prohibit or prevent the court from granting relief against a state.

Gunter v. Atlantic Coast Line Rd. Co., 200 U. S. 273, l. c. 292;
Prout v. Starr, 188 U. S. 537, l. c. 544.

II.

In construing a provision of the Constitution the court should inquire into and consider the origin of the provision and the history of the period during which it was enacted in order to determine its true purpose.

Prigg v. Pennsylvania, 16 Peters 539, l. c. 610-611;
Rhode Island v. Massachusetts, 12 Peters 657, l. c. 723;
Knowlton v. Moore, 178 U. S. 41, l. c. 95;
South Carolina v. United States, 199 U. S. 437, l. c. 456-7;
Legal Tender Cases, 12 Wallace 457, l. c. 560.

III.

The purpose and intent of the Eleventh Amendment to the Constitution of the United States was only to prevent

the courts of the United States from rendering money judgments against the respective states in favor of private individuals. It was not conceived to deprive the federal courts of jurisdiction over the respective states.

Cohens v. Virginia, 6 Wheaton 264, l. c. 406-7;
Charles Warren on "The Supreme Court in United States History," Vol. 1, pp. 93-102.

IV.

When a party intervenes in litigation, he does so in recognition of the jurisdiction of the court and the propriety of all orders and rulings of the court prior to the intervention.

French v. Capen, 105 U. S. 509, l. c. 525;
Commercial Electrical Supply Co. v. Curtis et al., 288 Fed. 657, l. c. 659;
Rice et al. v. Durham Water Co., 91 Fed. 433, l. c. 434.

V.

The removal of a case to the Supreme Court of the United States for review of a judgment in favor of a state does not constitute the commencement or prosecution of a suit against the state within the meaning of the Eleventh Amendment to the Constitution of the United States.

Cohens v. Virginia, 6 Wheaton 264, l. c. 409-410.

VI.

A constitution declares broad and general fundamental principles and should not be interpreted with the strictness of a private contract, but should receive a construction which is just and sensible and designed to accomplish the purpose for which the provision was enacted.

Juilliard v. Greenman (Legal Tender Case), 110 U. S. 421, l. c. 439;
In re Chapman, 166 U. S. 661, l. c. 667;
Lau Ow Bew v. United States, 144 U. S. 47, l. c. 59;
Williams v. United States Fidelity & Guaranty Co., 236 U. S. 549, l. c. 555.

VII.

Where the entire record is before the Supreme Court on certiorari the respondent may, in order to sustain the judgment or decree of the lower court, invoke the grounds which were decided against the respondent by the lower court, as well as those which were decided in his favor.

Story Parchment Company v. Paterson Parchment Paper Company et al., 282 U. S. 555, l. c. 560;
Langnes v. Green, 282 U. S. 531, l. c. 536-537.

VIII.

The Eleventh Amendment to the Constitution of the United States is not a mandatory or jurisdictional enact-

ment, but merely confers a personal privilege, which the state may waive by entering its voluntary appearance and submitting its rights to a federal court.

Clark v. Barnard et al., 108 U. S. 436, l. c. 447-448;
Gunter v. Atlantic Coast Line R. R. Co., 200 U. S. 273, l. c. 284, 291-292;
Cunningham v. Macon & Brunswick R. R. Co. et al., 109 U. S. 446, l. c. 451-452.

IX.

An intervenor must have a direct interest in or lien upon the property which is the subject matter of the suit in which he seeks to intervene, and such interest must be alleged and proved.

Smith v. Gale, 144 U. S. 509, l. c. 518-19;
Aronstam v. James et al., 273 Fed. 545, l. c. 547;
Glass v. Woodman et al., 223 Fed. 621.

X.

Where property is in the custody of a court, any question which arises concerning the right of a state to tax such property or to enforce a tax lien against it must be presented to and decided by the court having such custody.

In re Tyler, 149 U. S. 164, l. c. 182-3.

XI.

The main litigation, to which the present matter is ancillary, was in the nature of an action in rem, and the

property against which the State seeks to enforce its tax lien was and is within the custody of the District Court.

Franz v. Buder, 11 Fed. (2nd) 854, l. c. 859.

XII.

The Attorney-General of the State of Missouri had full and complete right, power and authority to enter the appearance of the State in this case and to waive the immunity of the State from suit in the federal court.

Section 590, R. S. Mo. 1929;
Section 11276, R. S. Mo. 1929.

(a) The question of whether or not a state has given one of its officers the power and authority to waive its immunity from suit in the federal court under the Eleventh Amendment to the Constitution of the United States must be determined by the local law of that particular state.

Palmer v. State of Ohio, 248 U. S. 32;
O'Conner v. Slaker, 22 Fed. (2nd) 147, l. c. 152-3.

(b) A statute having special reference to the subject matter involved in a suit and conferring power upon one of its officials to appear for and represent the State in that matter is sufficient to bind the State to a waiver of immunity by reason of an act done by such official under the terms of such statute.

Bow v. Plummer, 79 N. H. 23, l. c. 25.

XIII.

While the state courts and the courts of the United States have concurrent jurisdiction, they are parts of entirely separate systems of jurisprudence, as much as the courts of two foreign sovereign powers, and neither should interfere with the jurisdiction of the other, especially where one has acquired jurisdiction over, or custody of, specific property.

Covell v. Heyman, 111 U. S. 176, l. c. 182-3;
Ponzi v. Fessenden et al., 258 U. S. 254, l. c. 260-261.

XIV.

In the State of Missouri stock dividends are held to be corpus, and not income.

Hayes v. St. Louis Union Trust Company, 298 S. W. 91, l. c. 98.

ARGUMENT.

I. Eleventh Amendment.

The Circuit Court of Appeals held, contrary to the contentions of the petitioners, that the Eleventh Amendment to the Constitution of the United States did not prohibit the Court from issuing an injunction against the State of Missouri restraining it from prosecuting litigation in its own courts, which had for its purpose the nullifying of decrees previously entered by the federal court. In applying to this Court for the writ of certiorari, the State maintained that the foregoing question was one which had not been, but should be, settled by this Court. We respectfully desire to controvert that assertion, and in support of our position invoke:

Gunter v. Atlantic Coast Line Rd. Co., 200 U. S. 273, l. c. 292;
Prout v. Starr, 188 U. S. 537, l. c. 544.

In the Gunter case this Court said:

> "Indeed, the proposition that the Eleventh Amendment, or Section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a manner ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion (*Dietzsch v. Huidekoper*, 103 U. S. 494; *Prout v. Starr*, 188 U. S. 537; *Julian v. Central Trust Co.*, 193 U. S. 93, 112)."

The facts in Prout v. Starr were that after a suit involving certain railroad legislation of the State of Nebraska had been filed and was pending in the federal court, the Attorney-General of the State of Nebraska filed and endeavored to prosecute in the state courts an action involving the same subject matter. Thereupon, the original plaintiffs in the suit in the federal court filed their supplemental bill praying for an injunction against the Attorney-General restraining him from further prosecuting the action which he had filed in the state tribunal against the railway company. The Attorney-General "filed a demurrer on the ground that the bill was against the defendant in his official capacity as Attorney-General of the state, and was against the state, and that therefore the Court was, under the Eleventh Amendment of the Constitution, without jurisdiction." The demurrer was overruled and the injunction was issued as prayed. In affirming the case this Court said, at page 544:

> "The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the federal court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court (*Peck v. Jenness*, 7 How. 612, 625; *Chittenden v. Brewster*, 2 Wall. 191; *Artow v. Smith*, 18 How. 263).
>
> "The jurisdiction of the Circuit Court could not be defeated or impaired by the institution, by one of the

parties, of subsequent proceedings, whether civil or criminal, involving the same legal questions, in the state court (*Harkrader v. Wadley*, 172 U. S. 148, 166)."

The petitioners, however, in their brief in support of the petition for the writ of certiorari herein, state that the purpose of the Eleventh Amendment was to overrule, in effect, the decision in Chisholm v. Georgia, 2 Dallas 419, which had held that a state was suable *in assumpsit* in the federal courts at the instance of a private individual. From this premise opposing counsel deduce that by virtue of the Amendment the federal courts were deprived of their power to proceed against a state in *all* suits against a state by an individual. That the purpose of the Eleventh Amendment was as stated by our adversaries, has many times been recognized by this Court, but the conclusion which they draw therefrom has never received the approval of this tribunal.

A cardinal rule of constitutional construction was expressed in Prigg v. Pennsylvania, 16 Peters 539, at pages 610-611, as follows:

> "It will, indeed, probably, be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of

compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which might not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be **to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.**" (Emphasis ours.)

To the same effect are:

Rhode Island v. Massachusetts, 12 Peters 657, l. c. 723;
Knowlton v. Moore, 178 U. S. 41, l. c. 95;
South Carolina v. United States, 199 U. S. 437, l. c. 456-7;
Legal Tender Cases, 12 Wallace 457, l. c. 560.

What were the political and financial conditions which obtained at the time of the adoption of the Eleventh Amendment and existed directly prior thereto? The Articles of Confederation had been adopted in 1777, the year following the Declaration of Independence. Due to the unsatisfactory experience under the Articles, a Constitution was framed in 1787 and the Government began under the Constitution on March 4, 1789. Within less than one year (September 25, 1789) Congress proposed

the first ten amendments to the Constitution as a limitation upon the powers of the Federal Government and they received the necessary ratification in 1791. The colonists had just passed the threshold of a new venture into self-government, and, because of lack of precedent, the most vexing and trying questions were constantly arising incident to the new experiment. Within the borders of the new country were many who, rightfully or wrongfully, were suspected of not being loyal to the new Republic. The respective state treasuries were anything but replete with funds, and any step which tended to strengthen the national powers as against the states was regarded with the most profound suspicion. State bankruptcy and the establishment of a monarchy in this country were the two menacing specters which constantly harassed the minds of the people. Having just fought and bled for their liberty, they were not willing to be deprived of it without a contest.

Under those circumstances and with such antecedents, the suit of Chisholm v. Georgia was filed to the August Term, 1792, immediately after the preliminary bulwarks had been thrown up to protect the individual states and their citizens against encroachment on the part of the Federal Government; and what was still more alarming, the action was one *in assumpsit*, which had for its purpose the recovery of a money judgment against the State of Georgia by the estate of a British subject. When the Judges of the Supreme Court rendered their opinions on February 18, 1793, the nation was aflame with indigna-

tion. Of such facts as these was the Eleventh Amendment born.

The situation as it then existed is admirably depicted by Charles Warren in his work entitled "The Supreme Court in United States History," volume 1, pages 93-102. The author recites, at pages 97 and 98, how the National Gazette of June 1, 1793, declared that "it must excite serious ideas in those who have from the beginning been inclined to suspect that the absorption of the State governments has long been a matter determined on by certain influential characters in this country who are aiming gradually at monarchy." At page 99 of the same work it is further stated:

> "While this opposition to the Court's decision was to some extent based on divergencies of political theories as to state sovereignty, the real source of the attack on the *Chisholm Case* was the very concrete fear of the 'numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every State in the Union into the greatest confusion.' In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the states; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts."

A consideration of the foregoing factors is, we submit, convincing proof that those who framed and sponsored the Eleventh Amendment had in mind a purpose which was much more just and worthy than later schemes in support of which the Eleventh Amendment has been invoked. It is glaringly apparent that the patriots of the Eighteenth Century who were responsible for the amendment never at any time even remotely contemplated that it should be used as a weapon of aggression to emasculate the decrees of a federal court properly entered in a suit between individuals of which said court had jurisdiction. That the representatives of the State of Missouri have no loftier object than this in view is quite evident from excerpts taken from the opinion of the Court of Appeals, which the representatives of the State seek to have this Court reverse. That Court accurately said (R. 31):

> "From this history of the main litigation it is clear that the rights and interests of these appellants in this stock were involved in and determined in the federal court. Therefore, it must be evident that the contemplated action of the State in the probate court must have the purpose to relitigate this very matter. Unless the State can there obtain a result directly opposed to the determination of the federal court, it will completely fail in its purpose. There could be no plainer case of interference with the jurisdiction of a court and defeat of its decrees entered within its jurisdiction."

Judge Stone, in the opinion, also stated (R. 33):

> "The situation here is that a State is seeking to have a federal court, which has full jurisdiction over a *res* and which has entered its final decrees fully adjudicating the rights of these appellants in that *res*, transfer to and hold in its registry the property representing the interests of appellants in that *res* until the State can relitigate, in its own courts, the very issues of interest and title already determined by the decrees of the federal court."

The truisms in regard to the Eleventh Amendment hereinbefore set forth were recognized by no less an authority than Chief Justice Marshall. That eminent jurist in the historic opinion in the case of Cohens v. Virginia, 6 Wheaton 264, observed at pages 406-407:

> "It is part of our history that, at the adoption of the Constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress and adopted by the State Legislatures. That its motive was not to maintain the sovereignty of a state from the degredation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign

state. The jurisdiction of the Court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment then to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

"The first impression made on the mind is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. **A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the Government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation.**" (Emphasis ours.)

The State, however, contends for a strict construction of the language of the Amendment; it maintains that the

words "the judicial power of the United States shall not be construed to extend," etc., strip a federal tribunal of all right to entertain any proceeding whatever against a state. Such position is untenable. As will definitely appear from the cases cited under topic II, ante, a federal court may always entertain a suit by an individual against one of the states if the state consents to be sued. This petitioners admit to be the law. But, as it is an unquestioned doctrine, that consent alone never confers jurisdiction, it must be entirely clear that the Amendment presents no jurisdictional question.

Granting for the sake of argument that the interpretation placed upon the Amendment by the State would be justified in an original proceeding for an injunction against the State, nevertheless it cannot be applied to a bill such as the present, which in its nature is strictly ancillary. It is axiomatic that the right of a federal court to hear and determine an ancillary proceeding attaches by virtue of its jurisdiction in the main or original litigation, and that, therefore, it is unnecessary to allege or prove any jurisdictional facts in the ancillary proceeding. Applying that legal maxim to the case at bar brings us to an appreciation of the fact that the jurisdiction here attached upon the filing of the original bill in March, 1924. When the state intervened in June, 1931 (R. 2, 4), it did so in recognition of that jurisdiction.

French v. Capen, 105 U. S. 509, l. c. 525;

Commercial Electrical Supply Co. v. Curtis et al., 288 Fed. 657, l. c. 659;
Rice et al. v. Durham Water Co., 91 Fed. 433, l. c. 434.

Consequently, the inherent right of the Court to protect and effectuate its decrees already rendered, even though the rights of the State were involved, related back to the date of the original proceeding, and were not determinable as of June 10, 1931, the date of the filing of the ancillary bill (R. 6). In brief, regardless of the construction placed upon the Eleventh Amendment, it could not destroy jurisdiction which was previously existent; the greatest effect that it could have was to withhold jurisdiction in a new proceeding.

The facts in the present case, while not identical, are analogous to those in the case of Cohens v. Virginia, supra. We again quote from the opinion by Justice Marshall (6 Wheaton, l. c. 409-410):

> "If a suit, brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is clearly, in its commencement, the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defense against a claim made by a state."

• • • • • • •

"Where, then, a state obtains a judgment against an individual, and the Court rendering such judgment overrules a defense set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution or laws of the United States, can with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far reexamined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Consequently, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment."

Applying the reasoning of the Court in the Cohens case to the instant case, it may very properly be said that the filing of the ancillary bill for an injunction was not tantamount to a suit being "commenced" against the State, because the suit in which the bill was filed had been commenced years before. Likewise, the filing of the ancillary bill and the attempt of the respondents to proceed thereon was not equivalent to a suit being "prosecuted" against the State for the reason that the suit had already been prosecuted against the individual defendants prior to the State coming into the case and prior to the filing of the ancillary bill. In other words, we contend that an ancillary bill filed in a previously existent case is no more of a

separate suit or proceeding than is the taking of an appeal in a previously existent case; both steps, the taking of the appeal and the filing of the ancillary bill, are merely continuations of the main case, incidental thereto and dependent thereon. The branches of a tree cannot grow out into space without a trunk and roots to support them. If we are right in this position, then the case of Cohens v. Virginia is decisive of the case at bar.

But it must become apparent, however, that the Eleventh Amendment is not susceptible of the strict construction which the petitioners seek to place upon it. As was said by this Court in Juilliard v. Greenman (Legal Tender case), 110 U. S. 421, l. c. 439:

> "A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract."

On the contrary, a law should receive a sensible construction which will carry out the purpose of those by whom it was promulgated and adopted and so as to avoid unjust or absurd results.

In re Chapman, 166 U. S. 661, l. c. 667;
Lau Ow Bew v. United States, 144 U. S. 47, l. c. 59;
Williams v. United States Fidelity & Guaranty Co., 236 U. S. 549, l. c. 555.

In those cases it was stated that:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

We, therefore, respectfully submit that the entire purpose of the Eleventh Amendment was to obviate the possibility of money judgments being rendered by the federal courts in favor of individual plaintiffs against the states; that it was never intended to be used as a marauding instrument for obtaining judgments and decrees in state tribunals which were contrary to and in conflict with those already rendered by the federal courts with reference to the same subject matter, and that as a result the Eleventh Amendment is entirely inapplicable to the case at bar.

II. Waiver of Immunity.

A second ground urged by the respondents to support the granting of an injunction against the State is that the Eleventh Amendment is not a mandatory enactment, but merely confers a personal privilege which may be waived by the State. The Circuit Court of Appeals, while acknowledging the correctness of the proposition of law as above stated, declined to enforce it in the present case for the assigned reason that the State by its intervention

did not seek to have its alleged right to the inheritance tax claimed by it adjudicated in the federal court, but merely petitioned the federal court to retain the property in its registry pending a determination of the State's right to the tax in the state courts (R. 27, 28); that therefore the State did not submit to the jurisdiction of the federal court and did not waive its right to immunity.

Although the Circuit Court of Appeals, as aforesaid, decided against the respondents herein on the foregoing ground, it is still open for consideration by this Court because the entire record is before this Court, and we urge the additional ground in order to sustain the judgment of the Circuit Court of Appeals and not for the purpose of overthrowing it.

> Story Parchment Company v. Paterson Parchment Paper Company et al., 282 U. S. 555, l. c. 560; Langnes v. Green, 282 U. S. 531, l. c. 536-7.

We, therefore, proceed to an examination of the authorities which we believe justify the issuance of the injunction sought in the ancillary bill of complaint, even though the Eleventh Amendment may be applicable to the case.

In the leading case of Clark v. Barnard et al., 108 U. S. 436, the Court said, at pages 447-48:

> "The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, General Treasurer of the State of Rhode Island, on the ground that

the suit was, in effect, brought against the state by a citizen of another state, contrary to the Eleventh Amendment to the Constitution of the United States.

"We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination." (Emphasis ours.)

That case was cited with approval in Gunter v. Atlantic Coast Line Railroad Company, 200 U. S. 273, where the following language appears at page 284:

"c. Although a state may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking

the prohibitions of the Eleventh Amendment (Clark v. Barnard, 108 U. S. 436, 447)."

At pages 291-2 the Court continued:

"Third. It is insisted that the court below had no power to restrain the Attorney-General of South Carolina and the counsel associated with him from prosecuting in the state courts actions authorized by the laws of the state, and hence that the Court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the Eleventh Amendment and the provisions of Section 720 of the Revised Statutes, forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted (*In re Ayers*, 123 U. S. 443; *Fitts v. McGhee*, 172 U. S. 516). The difficulty is that the doctrine is inapplicable to this case. Section 720 of the Revised Statutes was originally adopted in 1793, whilst the Eleventh Amendment was in process of formation in Congress for submission to the states, and long, therefore, before the ratification of that amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the same comprehensive result effectuated by the prohibitions of the Eleventh Amendment. Both the statute and the amendment relate to the power of courts of the United States to deal, against the will and consent of a state, with controversies between it and individuals. None of the prohibitions, therefore, of the amendment or of the

statute relate to the power of a federal court to administer relief in causes where **jurisdiction** as to a state and its officers **has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination.**" (Emphasis ours.)

A statement of the doctrine very appropriate to the point here in issue is found in the case of Cunningham v. Macon & Brunswick Railroad Company et al., 109 U. S. 446, at pages 451-2:

"1. It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the Court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the Government, the Court will proceed to discharge its duty in regard to that property. And the state, if it chose to come in as plaintiff, as in prize cases, **or to intervene in other cases when she may have a lien or other claim on the property,** will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the Court. Of this class are the cases of *The Siren,* 7 Wall. 152, 157; *The Davis,* 10 Wall. 15, 20, and *Clark v. Barnard and Others,* 108 U. S." (Emphasis ours.)

The question which must be determined, therefore, is whether or not the action of the State in intervening in the litigation in the District Court was such that it constitued

a waiver of the privilege of immunity from suit conferred by the Eleventh Amendment.

The motion of the State to intervene contains the following language:

> "Comes now Stratton Shartel, Attorney-General of the State of Missouri, and for and in behalf of the State of Missouri moves the Court to permit the State of Missouri to intervene **as a party defendant in this cause.** * * *" (R. 2). (Emphasis ours.)

The said motion of the state for leave to intervene then sets forth that 188,333⅓ shares of the stock of Burroughs Adding Machine Company belonged to the estate of Sophie Franz, deceased, and that the same is subject to the inheritance tax of Missouri, and that upon the death of Sophie Franz the State of Missouri "acquired a lien upon all property belonging to said Sophie Franz at her death." The motion to intervene then stated:

> "That it is necessary to protect the interests of the State of Missouri in the assessment and collection of inheritance taxes upon all property belonging to said Sophie Franz at her death, that the State of Missouri be **permitted to intervene as a party defendant herein**, so that it may file proper pleading in opposition to the motions of Gustavus A. Buder and Gustav A. Franz, trustees, and Johanna F. Fiske, Amanda F. Wheeler, Otto B. Franz, Henrietta Holdoway, Adelaide Zimmerman, Sherman H. Kleinschmidt and Helen Kleinschmidt * * *" (R. 4). (Emphasis ours.)

The motion of the state to intervene then contained this language:

> "Wherefore, this applicant prays that he be permitted to **intervene as a party defendant** in this cause and to file such pleading and **offer such proof** as is necessary to protect its rights, and that an order be entered **making the State of Missouri a party defendant herein**" (R. 4). (Emphasis ours.)

Thus it will be seen that the application and intention of the State was to intervene as a party defendant in an unlimited sense for the purpose of asserting and establishing a lien on specific stock held by the trustees, subject to the jurisdiction of the District Court. In no sense did the State, through its representatives, seek to intervene in a special or limited form. Its representatives did not merely seek permission to file suggestions. The intervention was not *pro interesse suo,* but was a general intervention as a party defendant to contest the title of these appellants to said Burroughs Adding Machine stock and to assert and establish the lien of the State on said specific stock. The entry of the State of Missouri into this litigation was without restraint or qualification in either form or substance.

The order of the Court granted the State of Missouri leave to intervene as a defendant, in which order it was stated:

"It is ordered that said application be, and the same is hereby, granted, and the said petitioner is allowed five days from this date within which to file its formal intervening petition" (R. 2).

Thereupon, on June 6, 1931, the intervening petition of the State of Missouri was filed, in which petition the State alleged:

"Comes now Stratton Shartel, Attorney-General of the State of Missouri, and for and in behalf of the State of Missouri, for its intervening petition states * * *."

It was then alleged in said intervening petition that these remaindermen (respondents herein) had, by "diverse acts and by pleadings filed in this cause, extinguished, transferred and assigned their remainder interest to the life tenant, Sophie Franz" (R. 5).

The intervening petition further states:

"**That said stock**, except that portion thereof which belongs to plaintiff, the estate of Walter G. Franz, the estate of Ernest H. Franz and Eleanor Kleinschmidt, **was owned by Sophie Franz** at her death, should have been inventoried, and is subject to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of the said Sophie Franz, deceased, and the State of Missouri since the date of the death of said Sophie Franz, to wit, May 13, 1920, **has had and now has a lien upon said stock** for said taxes" (R. 5-6). (Emphasis ours.)

The intervening petition further states:

> "That the Circuit Attorney of the City of St. Louis, Missouri, **pursuant to the Inheritance Tax Law of said state**, has made application for the issuance of a citation in the estate of Sophie Franz, deceased, against the executor thereof to require him to inventory said stock. That said citation has been served and is returnable on June 12, 1931. That the Attorney-General, **pursuant to request from the Treasurer of the State of Missouri**, has entered his appearance in said proceeding to assist the Circuit Attorney therein" (R. 6).

Thus, the State of Missouri not only intervened as a party defendant, without limitation or qualification, but the State of Missouri, in its intervening petition, asserts a direct interest in and a lien upon the Burroughs Adding Machine stock, which is the subject matter of the suit.

How could the State hope to obtain the relief prayed for in its intervening petition without establishing an interest in the subject matter sufficient to justify the District Court in impounding the Burroughs stock? How did the State hope to establish that requisite interest in the subject matter unless it did in fact submit its rights to judicial determination in the District Court?

It is fundamental that an intervenor must have a direct interest or lien upon the property which is the subject matter of the suit, and that such interest must be made to appear from the allegations of the intervening petition.

Smith v. Gale, 144 U. S. 509, l. c. 518-19;

Aronstam v. James et al., 273 Fed. 545, l. c. 547;
Glass v. Woodman et al., 223 Fed. 621.

In recognition of the doctrine the State of Missouri fully alleged its interest in this subject matter of the suit and submitted, without reservation, its rights for judicial determination in this court. It alleges that the appellants, "prior to the entry of said decree, by divers acts and by pleadings filed in this cause, extinguished, transferred and assigned their remainder interest to the life tenant, Sophie Franz"; that said stock was owned by Sophie Franz at her death, should have been inventoried and is subject to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of Sophie Franz, deceased.

It was necessary for the State of Missouri to submit its alleged rights for judicial determination, **in order to establish its right to intervene and to enforce a lien.** Had it failed to do so, the intervention could not be sustained. We respectfully submit that the State of Missouri, having adopted this course, will not be heard to say that its rights or interests will be presumed as a matter of course and that property of others will be ordered paid in the registry of the District Court to await determination concerning the merit of the State's claim. If the State desires such affirmative relief, it must, as any other litigant, and as it attempted in this case, allege the basis therefor and prove its right thereto. It would be paradoxical to assert that the State could intervene in a cause such as the pres-

ent case without submitting and subjecting its alleged rights to judicial determination by this Court.

By prosecuting in the lower court its claim that it has a lien upon certain stock, which has been the subject matter of this suit, the State of Missouri comes into this litigation to such a full extent that the doctrine of Clark v. Barnard, 108 U. S. 436, Gunter v. Atlantic Coast Line, 200 U. S. 273, and Cunningham v. Macon Railway Company, 109 U. S. 446, hereinabove cited, is most appropriate and peculiarly applicable.

Even assuming that the State had desired and had intended to reserve the question of its alleged right to the inheritance tax for judicial determination in the Probate Court of the City of St. Louis, it could not have done so for the reason that the property upon which the tax was sought was in the custody of the United States District Court for the Eastern District of Missouri, and that therefore any question of the validity of the tax claimed by the State could be heard and determined only in that court.

We quote as follows from In re Tyler, 149 U. S. 164, l. c. 182 and 183:

> "The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis,* and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly prop-

erty so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, **but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the Court in respect of it.** The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and **the possession of property by the judicial department cannot be arbitrarily encroached upon,** save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary *fieri facias,* sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the Court. It is the duty of the Court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the Court will fail in the discharge of its duty, an assumption carrying a contempt upon its face." (Emphasis ours.)

The foregoing authority is directly applicable in the instant case for the reason that when the main litigation was first before the Circuit Court of Appeals that tribunal held (Franz v. Buder, 11 Fed. [2nd] 854, l. c. 859) that

the case was in the nature of an action *in rem* and that it involved "the potential necessity of assuming control of that property for the purpose of enforcing any decree that may be rendered, and of preventing any disposition of the property that may impair the efficacy of that decree" (R. 29). That adjudication became the law of the case, and was accepted and adopted by the State of Missouri, for it made said ruling binding upon itself by intervening in the case.

French v. Capen, 105 U. S. 509, l. c. 525;
Commercial Electrical Supply Company v. Curtis et al., 288 Fed. 657, l. c. 659;
Rice et al. v. Durham Water Co., 91 Fed. 433, l. c. 434.

There can be little question that the State was fully and completely bound by the action of its Attorney-General in intervening in the main litigation and is, therefore, bound by his waiver of the provisions of the amendment.

Section 11276, R. S. Mo. 1929, provides as follows:

"The Attorney-General shall institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; **and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.**" (Emphasis ours.)

Further, **Section 590, R. S. Mo. 1929**, on the specific subject of inheritance tax, provides:

> "The Prosecuting Attorney shall represent the state at all hearings, proceedings and trials under the provisions of this law in the probate and circuit courts, and **the Attorney-General shall, at the request of the State Treasurer, assist the Prosecuting Attorney in any such hearing, proceeding or trial and shall appear for and represent the state in any appeal or proceeding in the Supreme or Appellate Courts of this state, and in any case in the federal courts.**" (Emphasis ours.)

In this connection it will be noted that the intervening petition of the State of Missouri expressly recites:

> "That the Attorney-General, pursuant to request from the Treasurer of the State of Missouri, has entered his appearance in said proceedings to assist the Circuit Attorney therein" (R. 6).

The foregoing statutes are germane to the issue under consideration for the reason that the question whether a state has given its consent to be sued is determinable under the local state law of the particular state.

> Palmer v. State of Ohio, 248 U. S. 32;
> O'Connor v. Slaker, 22 Fed. (2nd) 147, l. c. 152-3.

The right of a State Attorney-General to waive the immunity from suit in behalf of his state arises from "a

statute having special reference to the subject matter of the suit and conferring power upon the official to appear for and represent the state."

> Bow v. Plummer, 79 New Hampshire 23, l. c. 25 (citing as authority for the foregoing enunciation Gunter v. Atlantic Coast Line Railroad Company, 200 U. S. 273, and Clark v. Barnard, 108 U. S. 436).

In view of Section 590, R. S. Mo. 1929, it is difficult to conceive of a case coming more squarely within the rule than the one under consideration. When the Legislature of the State of Missouri provided, as part and parcel of the Inheritance Tax Law of the State, that the "Attorney-General shall, at the request of the State Treasurer, assist the Prosecuting Attorney in any such hearing, proceeding or trial, and **shall appear for and represent the state** in any appeal or proceeding in the Supreme or Appellate Courts of the state, and **in any case in the federal courts**". (emphasis ours), it did everything humanly possible to render the act of the Attorney-General the act of the State itself when he enters litigation in the federal courts as he did in the instant case.

III. Conclusion.

To recapitulate, the position of the respondents is as follows:

First, the Eleventh Amendment to the Constitution of

the United States is entirely without application in this case because, in entertaining the supplemental bill for an injunction, the District Court would merely have been acting in a manner ancillary to a decree theretofore rendered, in order to protect its own jurisdiction, against which there is no constitutional inhibition.

Second, irrespective of the preceding point, and assuming that the Eleventh Amendment was applicable to the case at bar, the privilege thereby conferred was waived by the filing of the intervening petition by the State, because (a) the intervention was one which submitted the rights of the State for judicial determination, in order that its claim to an alleged lien on property within the custody of the District Court might be enforced, and (b) the Attorney-General of the State possessed, under the Missouri statutes, full, complete and absolute authority to bind the State by entering the case as an intervenor.

In the event our position with reference to either of the foregoing contentions is well taken, the judgment of the Court of Appeals should be affirmed and that of the District Court reversed.

If, however, this Court should for any reason disagree with both of the foregoing independent contentions, and should come to the conclusion that the judgment of the Court of Appeals should be reversed on a technical legal theory concerning the Eleventh Amendment, we most respectfully suggest that then the opinion of this Court should be confined to the question of law concerning the

suability of a state at the instance of a private individual and should not extend further so it may be seized upon to bolster up the State's alleged claim to an inheritance tax or so as to affect the question of the rights of the parties in regard to the ultimate distribution of the Burroughs Adding Machine Company stock. We offer the foregoing suggestion because the respondents herein have filed motions for the distribution of their interests in the property in question (R. 24), and there is pending before the United States Circuit Court of Appeals for the Eighth Circuit cause No. 9630, which is an appeal from the order of the District Court entered upon said petitions for distribution. Said cause was argued and submitted on March 21, 1933, but has not yet been decided, and we are constrained to believe (due to the customary promptness of that tribunal in disposing of matters before it) that said Court is withholding a decision in that matter because of a desire to defer, if necessary, to the decision of this Court in the present matter. In view of the fact that the lower court has, as heretofore mentioned, custody of the property in question, said court, rather than a state court, should order a proper distribution of such property. This is rendered clear by the following excerpt from the case of Covell v. Heyman, 111 U. S. 176, l. c. 182 and 183:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by

avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; **but between state courts and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience.** These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and **when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty.** To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. **'The jurisdiction of a court,'** said Chief Justice Marshall, **'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.** Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised' (*Wayman v. Southard*, 10 Wheat. 1)." (Emphasis ours.)

The Covell case is frequently invoked as authority. Within comparatively recent years the foregoing quotation was approvingly cited by the late lamented Mr. Chief Justice Taft in the case of Ponzi v. Fessenden et al., 258 U. S. 254, l. c. 260 and 261.

In the interest of a clear understanding, we desire to state that there is every reason to believe that even if the State's claim to an inheritance tax were adjudicated in the state courts, the result would be the same as in the federal courts, because the rule adopted by the Missouri courts in regard to stock dividends is the same as that applied by the Court of Appeals in the present litigation in Franz v. Buder, 27 Fed. (2nd) 101. (In this connection see Hayes v. St. Louis Union Trust Company, 298 S. W. 91, l. c. 98.) We, therefore, have no apprehension concerning the ultimate outcome of the inheritance tax controversy, but what we are most desirous of avoiding is any further undue or unnecessary delay in disposing of the matter. According to repeated adjudications by the Circuit Court of Appeals (R. 29-30), the property in question should have been distributed to these respondents immediately upon the death of Sophie Franz, the life tenant, which occurred on April 14, 1930 (R. 10). The accomplishment of a proper distribution of the property has already been delayed for more than two and one-half years because of the State injecting its fancied claim to an inheritance tax, and it would be unjust and inequitable to defer action for an additional period ranging between three and six years until the state courts of Missouri had threshed out the same question which has already been finally and conclusively disposed of by the United States District Court for the Eastern District of Missouri and by the Circuit Court of Appeals for the Eighth Circuit.

It is, therefore, respectfully submitted that both legal and moral justice, and practical as well as theoretical considerations, commend the affirmance of the decree of the Circuit Court of Appeals.

OSCAR E. BUDER,
G. A. BUDER, JR.,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1933.

State of Missouri and Franklin Miller, etc., Petitioners, *vs.* Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 6, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

By an ancillary and supplemental bill of complaint in the District Court of the United States, respondents sought an injunction against the State of Missouri restraining the State from prosecuting certain proceedings in the Probate Court of the City of St. Louis in relation to the estate of Sophie Franz, deceased. The State appeared specially and moved to dismiss the bill upon the ground, among others, that it was a suit against the State, which had not consented to be sued, in violation of the Eleventh Amendment of the Federal Constitution. The District Judge granted the motion upon that ground. The Circuit Court of Appeals reversed the order of dismissal, holding that the Eleventh Amendment was inapplicable, in the view that the ancillary and supplemental bill had been brought to prevent an interference with the jurisdiction of the Federal Court. 62 F. (2d) 150. The case comes here on certiorari, 289 U. S. 720.

The circumstances are these: By the will of Ehrhardt D. Franz, who died in 1898, his property was left to his wife, Sophie Franz, for life, with remainder to his ten children. The will was probated in the Probate Court of the City of St. Louis. In 1909, Sophie Franz transfered certain securities, in part belonging to her husband's estate, to trustees to hold during her life. On its creation, the trust embraced shares, belonging to her husband's estate, which had been increased by stock dividends; later, these shares were exchanged for shares of a successor corporation and these were further increased by stock dividends.

There has been protracted litigation in relation to this trust and the property held by the trustees. The present suit was brought, in 1924, in the District Court of the United States, by one of the sons of Ehrhardt D. Franz, to determine and quiet his remainder interest and to obtain an accounting and security for his protection. Indispensable parties (owners of other remainder interests) being absent, the original bill was dismissed. *Franz* v. *Buder*, 11 F. (2d) 854, 858. An amended bill was filed and the present respondents, who are children of Ehrhardt D. Franz and not residents of Missouri, were brought in with others. On an ancillary bill, it appearing that the Federal Court had first acquired jurisdiction over the subject matter in an action *quasi in rem*, defendants Sophie Franz and her trustees were enjoined from prosecuting a suit in the circuit court of the City of St. Louis for the determination of the same issues. *Franz* v. *Franz*, 15 F. (2d) 797. The present suit in the Federal Court then proceeded to decree, in 1927, which, with modifications as to security and costs, was affirmed by the Circuit Court of Appeals in the following year. *Buder* v. *Franz*, 27 F. (2d) 101.

There is a question between the parties here as to the scope of this decree, but we may assume, for the present purpose, that this decree, as stated by the Circuit Court of Appeals in the decision under review (62 F. (2d) pp. 151, 153, 154), determined the rights of the present respondents by virtue of their remainders under the will of Ehrhardt D. Franz. The decree, as thus construed, determined that certain shares, with their increase through stock dividends, were *corpus* of the estate of Ehrhardt D. Franz, and not income, and hence that Sophie Franz had only a life interest. *Id.*, 27 F. (2d) pp. 105, 113, 114.

Later, in 1930, Sophie Franz died and her estate is in the course of administration in the Probate Court of the City of St. Louis. Her executor, in view of the decree of the Federal Court, did not include the shares above mentioned in his inventory of her estate. Thereupon, in 1931, the State of Missouri procured the issue, on behalf of the State, of a citation in the Probate Court to compel the executor to inventory these shares as assets of the estate of Sophie Franz. The State of Missouri then moved in the Federal Court for leave to intervene. The State set forth the issue of the citation in the Probate Court; that the respondents, and others in interest, were seeking in the Federal Court

to obtain distribution of the shares of stock in question, and that to protect the State's right to inheritance taxes intervention was necessary to oppose that distribution pending the determination of the issues involved in the proceeding in the Probate Court. The application for intervention was granted.

The State then filed its intervening petition alleging that the decree of the Federal Court, while finding the interests in remainder of certain children of Ehrhardt D. Franz, made no finding as to other children, and that the latter, including the present respondents, although remaindermen, had "prior to the entry of said decree, by diverse acts and by pleadings filed in this cause, extinguished, transferred and assigned their remainder interest to the life tenant, Sophie Franz"; that the stock in question "should have been inventoried" and was subject "to the assessment and collection of inheritance taxes of the State of Missouri under the terms of the will of Sophie Franz", and that for these taxes the State had a lien upon this stock. The petition prayed that a portion of the stock should be transferred to the registry of the Federal Court to be held until the Probate Court determined whether the stock should have been inventoried by the executor of the estate of Sophie Franz. The present respondents (with others) answered the petition in intervention denying that the decree of the Federal Court had been limited as alleged and setting up their rights under the decree as *res judicata*. They asked that the petition be dismissed and that their motions for distribution be sustained.

Shortly before filing this answer the present respondents brought their ancillary and supplemental bill of complaint to enjoin the State of Missouri from "prosecuting further the said citation in the Probate Court" and "from seeking or obtaining any order, decree, or judgment therein" until the further direction of the District Court. The Circuit Court of Appeals, in sustaining the jurisdiction of the District Court to entertain the bill for this purpose, stated that the extent to which that jurisdiction should be exercised was "the protection of the jurisdiction and decrees of the trial court"; that it did not extend to matters not involved in the main litigation. 62 F. (2d) p. 157.

First. The first question is whether the State has waived the immunity it now claims. Immunity from suit under the Eleventh

Amendment is a personal privilege which may be waived. *Clark* v. *Barnard*, 108 U. S. 436, 447, 448; *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 284. It may be waived by a voluntary proceeding in intervention (*Clark* v. *Barnard, supra*) and the question is as to the effect of the State's application to intervene in this suit. The Circuit Court of Appeals held that it did not amount to a waiver, but the respondents press the question in supporting the decree under review.

While the motion of the State was for leave to intervene as "a party defendant", the Circuit Court of Appeals pointed out that by the petition in intervention the State did not seek the determination "of any rights or title", that it expressly pleaded "that such determination will take place in the Probate Court", and that the only relief asked was that the Federal Court should not distribute the stock from the trustees to the present respondents but should "place it in its registry to abide the result of the determination of the rights of the State by the Probate Court". The Circuit Court of Appeals was of the opinion that the only purpose and result of the intervention would be to retain the stock within Missouri in a place where it could be made to respond to the tax claims of the State if these claims were upheld. In determining the question presented to it on the appeal, the Court was not concerned with the propriety of allowing the intervention for that purpose or with its legal classification as *pro interesse suo* or otherwise. As only a "temporary impounding" was sought, which was "in no sense a matter of right, but rather partakes of grace", the Court concluded that the intervention was too limited in character to constitute a waiver of the immunity given by the Amendment, if that immunity would otherwise exist. 62 F. (2d) pp. 152, 153. We think that the Circuit Court of Appeals was right.

Second. The Eleventh Amendment is an explicit limitation of the judicial power of the United States. "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State". However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The "entire

judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given". *Ex parte State of New York*, 256 U. S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans* v. *Louisiana*, 134 U. S. 1, 10; *Palmer* v. *Ohio*, 248 U. S. 32, 34; *Duhne* v. *New Jersey*, 251 U. S. 311, 313, 314.

The ancillary and supplemental bill is brought by the respondents directly against the State of Missouri. It is not a proceeding within the principle that suit may be brought against state officers to restrain an attempt to enforce an unconstitutional enactment. That principle is that the exemption of States from suit does not protect their officers from personal liability to those whose rights they have wrongfully invaded. *Tindal* v. *Wesley*, 167 U. S. 204; *Prout* v. *Starr*, 188 U. S. 537, 543; *Gunter* v. *Atlantic Coast Line R. Co., supra; Ex parte Young*, 209 U. S. 123, 150 *et seq.* Here, respondents are proceeding against the State itself to prevent the exercise of its authority to maintain a suit in its own court.

The proceeding by ancillary and supplemental bill to restrain the State from this exercise of authority is unquestionably a "suit". Said Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 407, 408: "What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. . . . To commence a suit is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance". The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of State debts in the federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, nothwithstanding the chief motive for its adoption, were not so limited. Expressly applying to suits in

equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State. This conception of the Amendment has had abundant illustration. *Louisiana* v. *Jumel*, 107 U. S. 711, 720; *Hagood* v. *Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 497; *Fitts* v. *McGhee*, 172 U. S. 516, 529.

Respondents' bill asserts a right to maintain their interests as remaindermen under the will of Ehrhardt D. Franz with respect to certain shares of stock against an attempt of the State to lay inheritance taxes on these shares as the property of Sophie Franz, the deceased life tenant. In order to enforce this asserted right respondents bring their bill to obtain the equitable remedy of injunction against the State. This is not less a suit against the State because the bill is ancillary and supplemental. The State had not been a party to the litigation which resulted in the decree upon which respondents rely. The State has not come into the suit for the purpose of litigating the rights asserted. Respondents are attempting to subject the State, without its consent, to the court's process.

The question, then, is whether the purpose to protect the jurisdiction of the Federal Court, and to maintain its decree against the proceeding of the State in the State Court, removes the suit from the application of the Eleventh Amendment. No warrant is found for such a limitation of its terms. The exercise of the judicial power cannot be protected by judicial action which the Constitution specifically provides is beyond the judicial power. Thus, when it appears that a State is an indispensable party to enable a federal court to grant relief sought by private parties, and the State has not consented to be sued, the court will refuse to take jurisdiction. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451, 457; *In re Ayers, supra*, p. 489; *Christian* v. *Atlantic & N. C. R. R. Co.*, 133 U. S. 233, 244; *Stanley* v. *Schwalby*, 147 U. S. 508, 518; *South Carolina* v. *Wesley*, 155 U. S. 542, 545; *Belknap* v. *Schild*, 161 U. S. 10, 20. And if a State, unless it consents, cannot be brought into a suit by original bill, to enable a federal court to acquire jurisdiction, no basis appears for the contention that a State in the absence of consent may be sued by means of an ancillary and supplemental bill in order to enforce a decree.

The fact that a suit in a federal court is *in rem* or *quasi in rem*, furnishes no ground for the issue of process against a non-consenting State. If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest. But when the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit. See *The Siren*, 7 Wall. 152, 154; *The Davis*, 10 Wall. 15, 19; *Georgia* v. *Jesup*, 106 U. S. 458, 462; *Cunningham* v. *Macon & Brunswick R. R. Co., supra*, p. 452. *Ex parte State of New York, supra*, pp. 497-500.

We express no opinion upon the question whether the decree of the District Court, entered during the lifetime of Sophie Franz, the life tenant, in this suit to which she, her trustees and the remaindermen were parties, can be regarded as binding upon the State of Missouri with respect to its subsequent claim for inheritance taxes against the shares in controversy as a part of the life tenant's estate. That question is not before us. Whatever may be found to be the effect of this decree in that relation, the result is the same so far as the present question of the right of respondents to bring this bill against the State is concerned. If the State, by reason of the fact that it was not a party to the litigation, is not bound by the decree, it is manifestly free to litigate its claim to the taxes in the proceeding it has instituted in its own court. *United States* v. *Lee*, 106 U. S. 196, 222; *Tindal* v. *Wesley, supra*, p. 223; *McClellan* v. *Carland*, 217 U. S. 268, 282. But if the decree of the Federal Court can be considered as determining the ownership of the shares so as to bind the State in later tax proceedings upon the death of the life tenant and there is a federal right to have that effect given to the decree, that federal right can be specially set up and claimed in the proceeding in the State Court, and, if the right is finally denied, the decision may be the subject of review by this Court in case the appropriate procedure is followed. *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 46. See *Tilt* v. *Kelsey*, 207 U. S. 43. The contention that the question of ownership of the shares has been finally determined by the Federal Court affords no ground for the conclusion that the Federal

Court may entertain a suit against the State, without its consent, to prevent the State from seeking to litigate that question in the State Court.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with directions to dismiss the ancillary and supplemental bill.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.